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THE TRANSFER OF PROPERTY ACT

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transfers is based, in simplest possible language. Explanation of the concepts and statement of law both have been given in a very simple language with suitable illustrations. The book is in the form of section-wise commentary on the Transfer of Property Act. The student finds the bare provisions of law laid down in a particular section and its explanation at the same place. But, special care has been taken to explain the provisions of each section in such a manner that law laid down in one section does not appear to be an isolated exposition of the provisions on a particular topic. This enables a student to find the law on a particular topic with all its correlated matters. The important sections which often find place in the question-papers of L.L.B. and competitive examinations have been dealt with exhaustively and almost like a topic on the subject. The central idea behind writing yet another text-book on this subject has been to provide to the students preparing for L.L.B. and competitive examinations, a book containing all the topics in their own simple language relieving them from extra burden of consulting huge volumes of leading authorities beyond their academic reach.

I express my gratitude to my respected teacher Prof. U. N. Gupta, M.Sc., LL.M., D. Phil, Head & Dean, Faculty of Law and Pro-Vice Chancellor, Allahabad University who taught me the art of writings on legal-subjects and has always been a source of inspiration for my academic pursuits. My thanks are due to Professor U.P.D. Kesari, LL.M., D.Phil., whose academic discussions and valuable suggestions have helped me in further polishing the felicity of this book. Professor, S.N. Mishra, my senior colleague, has always been my well-wisher and has given me friendly advice from time to time. I wish to express my thanks to him. I am grateful to my wife Smt. Meera Sinha, M.A. who has relieved me from my domestic liabilities, without her co-operation the book could not have been completed in due course.

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RAMA KANT SINHA

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THE TRANSFER OF PROPERTY ACT, 1882

(Act No. IV of 1882)

[As amended up-to-date]

An Act to amend the law relating to the Transfer of Property by act of parties

Preamble.—Whereas it is expedient to define and amend certain parts of the law relating to the Transfer of Property by act of parties; It is hereby enacted as follows :

SYNOPSIS

- Object of the Act.
- Scope of the Act.
- Not Exhaustive.
- Transfers by Operation of Law Excluded.
- Transfers Mainly of Immovable Properties.
- Muslim Law.
- Saving of certain Incidents and Rights.
- Territorial Limitations.
- Amendments to the Act.

INTRODUCTION

Object of the Act.—The object of the Transfer of Property Act, 1882, is given in its preamble. In the beginning of almost every Act, there is a 'preamble' which briefly gives the objects or purposes of the enactment. The preamble to the Transfer of Property Act, 1882, lays down that the Act has been enacted because it was 'expedient to define and amend certain parts of the law relating to the transfer of property by act of parties.' This Act was, therefore, enacted because it was necessary to give a definite meaning and make changes in some of the rules which at that time regulated the transfer of properties by act of parties. Transfer 'by act of parties' is a transfer which takes place between two living persons. Such transfers are also called 'transfer *inter vivos*'. For example, sale or gift is a transfer of property by act of parties because transferor and transferee both must be living persons on the date of sale or gift. Transfer of Property under will, inheritance or by an order of the Court is a transfer by 'operation of law'. It is not a transfer by act of parties because in such transfers

the transferor is not a living person and the transfer takes place automatically under the given law.

Transfer of properties by operation of law are governed by personal laws e.g. Hindu and Muslim law of wills and inheritance or by order of the Court under the Civil Procedure Code. Transfer of movable properties by act of parties was regulated by Chapter VII (Sections 76 to 123) of the Indian Contract Act, 1872.¹ Thus, before 1882, although there were specific provisions for the transfers by operation of law under the personal laws and there was also law for the transfer (sale) of movables by act of parties, but there was no definite law for the transfer of immovable properties by act of parties. In the absence of any specific enacted law for the transfers of immovable properties by act of parties, the Anglo-Indian Courts used to decide the cases by applying the principles of equity, justice and good conscience as it prevailed in England. There were certain Regulations which also contained rules for the transfer of immovable properties. For example, the Madras Regulation of 1802, Bombay Regulation of 1827, Bengal Regulations of 1798 and 1806 etc., had laid down some of the basic rules for the transfer of immovable properties. But these Regulations were not exhaustive. There were no sufficient provisions in these Regulations for all types of transfers. The result was that in most of the cases the courts had to apply the rules of English law on the basis of equity, justice and good-conscience. The principles of equity are such fundamental principles of justice which the courts apply in the absence of any specific law on a point so as to do justice with the case. The Anglo-Indian Courts, in which the judges were mostly British people who used to apply the principles of equity as was known in England. But the application of English equity to Indian cases was doing less than justice because the socio-economic conditions in India were altogether different from those of England. Moreover, while applying the rules of equity, the judges were free to give their own interpretations and explanations of English rules. Therefore, their decisions were not uniform and the case-law had become conflicting and confusing. A clear, certain and uniform law for the transfer of immovable properties by act of parties was, therefore, urgently required in India.

The task of drafting a definite and uniform law suitable for this country was taken up by the First Law Commission. After suitable modifications made several times, the draft-bill was referred to the Second Law Commission. Finally, the bill was passed by the Legislative Council and became law on 17th February, 1882. Thus came into existence a clear, certain and uniform enacted law relating to transfer of property by 'act of parties' in the name of the Transfer of Property Act, 1882. The Act was enforced with effect from 1st July, 1882.

Besides providing a uniform enacted law on transfer of immovable properties, this Act also fulfils the requirement of completing the 'Code of

1. Chapter VII of the Indian Contract Act, 1872 was taken out from this Act, in 1930 and since then there is a separate enactment, the Sale of Goods Act, 1930 which contains rules for the transfer (sale) of movable properties. Movable properties are commonly known as 'goods'.

Contract' (the Indian Contract Act, 1872). It may be noted that contract is a legal agreement between two parties, with some object or purpose. No contract is made only for the sake of making. It is made for something to be done or not to be done. In contracts relating to properties, the purpose is to get the property or property rights transferred. The purpose of such contracts cannot be fulfilled unless the property concerned is transferred. Although for a contract there was already the Indian Contract Act, 1872 but for the transfer of property, there was no enacted law. Therefore, before 1882, the Code (enacted law) of contract was not complete. The Transfer of Property Act, 1882, completed the Code of Contract.² Moreover, as stated earlier before 1882 there were well established personal laws for regulating testamentary (wills) and intestate (inheritance) successions but no parallel laws were in existence for dealing with transfers *inter vivos* (transfer between living persons). The Transfer of Property Act, 1882 makes the law of transfer of property between living persons parallel to the law governing transfer of property by operation of law. And in this manner, law governing testamentary and *inter vivos* transfers of property Act, the law for both the kinds of transfer, testamentary and *inter vivos* was completed in India.

The areas of the subject in which the Act is applicable, it overrides personal laws relating to transfer of property. And therefore unless the title to the suit property has passed in accordance with the provisions of the Act, no right arises to claim enforcement of the right of pre-emption. A mere agreement to sell does not have the effect of transferring property, pre-emption could not be claimed.³

The object of the Transfer of Property Act may be summarised as under:-

- (i) The Transfer of Property Act, 1882 provides a definite, clear and uniform law for transfer of immovable property by act of parties i.e., transfer between living persons.
- (ii) The Act has modified and made changes in some of the rules which existed before its enactment. The changes were made so that the laws may be made suitable to the socio-economic conditions of India.
- (iii) The Transfer of Property Act completed the Code of Law of Contract. Before this Act, although there was Code (enacted law) for Contracts, but there was no enacted law for transfers which used to take place in furtherance of a contract.⁴
- (iv) By making provisions for *inter vivos* transfers, the Transfer of Property Act has enacted a law parallel to the already existing

2. That this Act completes the Code of Contract is evident from Section 4 of the Act. According to Section 4, those chapters and sections of the Transfer of Property Act, 1882, which relate to contract should be taken as part of the Indian Contract Act, 1872.

3. *Kumar Ganesiah v. Mabel Milgum*, (2008) 10 SCC 153.

4. During the period of ten years that is to say, between 1872 when Contract Act was passed and 1882 when the Transfer of Property Act was enacted, the transfer of property under contracts was regulated by principles of equity, justice and good conscience. But, the case-law was not uniform.

laws of testamentary and intestate transfers i.e., transfer of property under wills and under the law of inheritance.

Scope of the Act.—The scope of the Transfer of Property Act is limited. It is not a complete code of transfer of property. The limitations to the applicability of this Act are there in many respects. It covers only a specific mode, namely, transfer of property between living persons. The limitation is also with regard to the territorial jurisdiction of the Act; it has no uniform application in all the parts of the country. Moreover, certain rights and incidents of property have specifically been saved from the operation of this enactment. The scope of the Transfer of Property Act may briefly be stated as under:

1. **Not Exhaustive.**—The Act is not exhaustive. It does not contain complete law for all kinds of transfers in India. There are several modes or methods of transfer. There are also several kinds of properties. The Act does not incorporate rules for all the modes of transfers of property of every kind. The Preamble to the Act itself makes it clear that the main purpose of the Act is to 'define and amend parts' of the pre-existing law of transfer of property by 'act of parties'. The Act does not say that its object is to collect and consolidate all the laws of transfer of properties in India. Even with regard to transfers by act of parties, the Act is not exhaustive because in this kind of transfer too, there are several allied or correlated matters for which there is only a passing reference; detailed rules on such allied matters are not available.⁵ For example, the Act deals with mortgages, and charges but with respect to these transactions, the Act has not been regarded to be exhaustive.⁶ Similarly, although the easementary rights are proprietary rights but the Transfer of Property Act is not applicable to easements.⁷

2. **Transfers by Operation of Law Excluded.**—The Act does not apply to transfers by operation of law. Transfer of properties may take place either by act of parties or, by operation of law. Transfer by act of parties is a transfer between living persons which takes place by express or implied agreement between such living persons. On the other hand, in the transfer by operation of law the property is transferred even though the transferor is not a living person on the date of the transfer. In such transfers, the property is transferred automatically by the process of law; the transferor has to do nothing. For example, in the case of inheritance or under wills the devolution of property upon the legal heirs or legatees, is a transfer by operation of law. These transfers take place by operation or working of the law of inheritance or the law of wills. The propositus (deceased) or the legator has to do nothing after his death; the transmission of property is automatically done under the law of inheritance or law of wills. Similarly, transfers by orders of Court are also

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transfers by operation of law because they are made not by owners of the property but by Court of law. Transfers by operation of law have been held to include action sales confirmed by the court.⁸ Thus, transmission of property in the cases of insolvency, forfeiture or sale in execution of Court's decree, are transfers by operation of law. The Transfer of Property Act is applicable only to transfers by act of parties; it does not apply to transfers under Court orders.

3. **Transfers Mainly of Immovable Properties.**—The Act deals mainly with transfer of immovable properties. Transfers of movable properties are regulated by the Sales of Goods Act, 1930. However, it may be noted that Transfer of Property Act, 1882 incorporates certain basic rules of transfer of properties irrespective of their kind. These fundamental principles relate to the nature of transfers in general. The provisions of the Transfer of Property Act which deal with such principles, are applicable also to transfer of movable properties. Sections 5 to 37 of Chapter II are applicable also to the transfer of both kinds of property, movable as well as immovable. The remaining Sections (38 to 53-A) of this Chapter contain rules for the transfer of only immovable properties. In so far as specific transfers are concerned, the definitions of gifts and exchange in the Act are not limited to immovable properties; they include the gift and exchange also of the movables. On the other hand, provisions regarding sale, lease, mortgage and charges are applicable to transfers of only immovable properties.

4. **Muslim Law.**—According to Section 2 of the Act, provisions of Chapter II of this Act do not affect any inconsistent rule of Muslim Personal Law. Chapter II of this Act deals with concept and principles of transfers generally. Accordingly, if there is any provision in the Transfer of Property Act which is against any rule of Muslim Law, the rule of Muslim Law would prevail over the conflicting provisions of this Act. For example, provision of Section 14 dealing with the rule against perpetuity would not be applicable to family-waqs (*Waqf-ul-aulad*) created by Muslims because rules of the family-waqs under Muslim Law are inconsistent with the provisions of Section 14. Moreover, gifts made by Muslims are governed by the Muslim Law of *Hiba*. Section 129 of the Transfer of Property Act specifically provides that provisions of Chapter VII (on Gifts) would not be made applicable to gifts made by Muslims. However, it may be noted that exemption from the operation of this Act is with respect to only such rules of Muslim Law which are in conflict with any provision of the Act dealing the transfers in general (given in Chapter II of this Act). Except gifts, provisions of the Act dealing with specific transfers such as, sale, lease, mortgage etc., are applicable to transfers made by any person, including Muslim, irrespective of religion, caste and creed.

5. **Saving of certain Incidents and Rights.**—Section 2 of the Act exempts certain incidents of a contract or constitution of property from the operation of this Act. Constitution of property means essential nature of property. Thus, the provisions of this Act cannot be applied so as to change or affect the basic nature

5. *Seth Gauram Seth Pillai v. Smt. Kunjibai*, A.I.R. 1940 Nag. 163.

6. *H.V. Low & Co. v. Pullaibharali Srinah*, A.I.R. 1933 Cal. 154.

7. *Sital Chandra v. DeLamney*, (1916) 20 Cal.W.N. 1158. The easements are dealt with separately under the Indian Easements Act, 1882.

8. *Arvind Kumar v. Govt. of India*, (2007) 5 SCC 745.

[Int.]

of the property itself. The Act also saves certain property rights from the mischief of this enactment. For example, right of partition of immovable properties is an incident of property, but this right is not affected by the provisions of the Act and a valid partition may be made orally.⁹

6. Territorial Limitations.—The Transfer of Property Act has territorial limitations as well. The Act is not applicable to certain territories included in the State of Punjab. In other parts of the country where the Act is now applicable, it was not enforced at one stretch. The Act was made applicable to different territories in India on different occasions.¹⁰

It may be stated, therefore, that the scope of the Act is limited in many respects. Its applicability is limited from the point of view of the mode of transfer, the kind of property and also with regard to its territorial jurisdiction.

AMENDMENTS TO THE ACT

After its enforcement in 1882, the Transfer of Property Act was amended from time to time on several occasions. In 1885, the Act was amended to bring this enactment in conformity with the provisions of the Indian Registration Act. Ten years later, the Act was amended in order to exclude the Government Grants from its purview. The Amending Act of 1900, besides reshaping Chapter VIII (actionable claims) had also modified the provisions of Sections 3, 6(e) and 6(f). In 1904 amendments were made in Sections 1, 59, 69, 107 and 117 and the Local Governments were given authority to apply the provisions of this Act to particular classes of agricultural leases. The Amending Act of 1908 provided that procedural rules relating to mortgages were to be governed by the provisions of the Civil Procedure Code. The Amending Act of 1917 validated certain mortgages and gifts in Agra and Oudh and in 1920, changes were made in Section 1 of the Act. In 1915 and 1925, amendments were made in Sections 69 and 130 respectively. By the Amending Act of 1926 the definition of the word "attested" was included in Section 3 and later on in 1927 this definition was given retrospective effect. Thus, the Act was subjected to amendments as many as twelve times. But, as the modifications were generally in respect of procedural rules, some very important issues of substantive law remained unexplained. While applying the Act, the Courts found that certain provisions of law were ambiguous and incomplete. A clear exposition of law on such issues was deemed necessary. Accordingly, the Transfer of Property (Amendment) Act, 20 of 1929 was passed by the Parliament to provide an exhaustive modification on several important issues of substantive law. Besides giving statutory recognition to the equitable doctrine of part performance by including Section 53-A, the Amending Act of 1929 has also made some very important changes in the law of mortgages. For example, Section 60-A has now been included to provide that a mortgagor who is entitled to redeem, may require the mortgagee to transfer the mortgage debt to third party. Similarly, Section 63-A gives statutory recognition to the mortgagee's right of compensation for necessary

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improvements. By including Section 65-A the Amending Act of 1929 provides statutory recognition to mortgagor's power to make leases and Section 67-A provides for mortgagee's obligation of enforcing several mortgages simultaneously by the same mortgagor. Some important changes have been made by the Amending Act of 1929 also in Section 3 (registration amounts to notice and notice to an agent is a constructive notice to his principal), Section 15 (validity of transfer of property to a class of persons in which some are incompetent transferees), Section 58 (condition in the mortgage by conditional sale to be included in the same deed) and Section 92 (extension of the rule of subrogation) etc. In this manner we find that the Amending Act of 1929 has brought about major changes in important legal issues in order to meet the socio-legal requirements of this Country. Further, it may be noted that the State Governments may also modify the procedural rules of this Act for their territories. For example, the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976 has modified Sections 54 and 107 with regard to the requirement of registration. The Benami Transaction (Prohibition of the Right to Recover) Act, 1988, which is an enactment of Parliament, has radically modified the provisions of Section 41 of the Transfer of Property Act.

9. For details, refer to Section 2 of the Transfer of Property Act, 1882.

10. Refer to commentaries on Section 1.

I

PRELIMINARY

1. Short title.—This Act may be called "The Transfer of Property Act, 1882".

Commencement.—It shall come into force on the first day of July, 1882.

Extent.—It extends in the first instance to the whole of India except the territories which immediately before the 1st November, 1956, were comprised in Part B States or in the State of Bombay, Punjab and Delhi.

But this Act or any part thereof may by notification in the Official Gazette be extended to the whole or any part of the said territories by the State Government concerned.

And any State Government may, from time to time, by notification in the Official Gazette, exempt, either retrospectively or prospectively, and part of the territories administered by such State Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

Notwithstanding anything in the foregoing part of this section, Sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

SYNOPSIS

- Territorial Jurisdiction.
- Punjab.
- Exemption and extension of specified sections.

Territorial Jurisdiction.—The territorial jurisdiction of an Act means the territories or the places in which an Act is applicable. The territorial jurisdiction of the Transfer of Property Act, 1882, extends to the whole of India except Punjab. But this Act was not enforced throughout the Country at one stretch; it was made applicable in different parts of India from time to time at different stages. On 1st July, 1882 when the Act was first enforced, it extended to

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PRELIMINARY

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the whole of 'British India' except Burma, Bombay and Punjab. During the British rule, the term 'British India' meant all territories which were at that time in the dominion of His Majesty and were governed through the Governor General of India or through Governor or any other officer under the Governor General in Council. Thus, at the time of its commencement in 1882, the Transfer of Property Act was enforceable in all the territories of India under the British rule excepting Burma, Bombay and Punjab (then Pepsu). However, the Local Governments of the above mentioned three territories were given power to extend this Act or any provision thereof to their respective areas by notification in the Official Gazette through local regulations. In furtherance of this power, the Act was first extended to the territories of Bombay with effect from 1st January, 1893. To the Province of Sind, the Act was enforced with effect from 1st January, 1915 and to the territories of Burma it was made applicable with effect from December 22, 1924. Similarly, the Act was enforced in the parganas of Manipur and Panth Piploia in the year 1929. When India got independence in 1947, the native States were either merged in or, their jurisdiction was handed over to the Provincial Governments. The Provincial Governments extended the Transfer of Property Act and other laws enforced in the British India to such merged States in exercise of the power given to them under the Extra Provincial Jurisdiction Act, 1947. In 1950 when India became Republic, the former States were formally merged in it and were called Part B States. The Merged States Laws Act, 1950 and the Part B States (Laws) Act, 1951, reimposed all the existing laws including the Transfer of Property Act enforced in other parts of the country, also to Part B States. Since then the Transfer of Property Act, 1882 has been applicable to these merged States as well. In 1956 when the Indian States were reorganised and renamed, the expression, "except the territories which immediately before the 1st November, 1956 were comprised in Part B States....." was substituted for the expression "except Part B States" in Section 1 (third paragraph) by the Adoption of Laws (No. 2) Order, 1956. This change was necessary because the former native States, called Part B States, had already been included in the Republic of India and to them the Transfer of Property Act was applicable since 1951. In Delhi, this Act (excepting Section 129) was made applicable with effect from December, 1962. Similarly, in the remaining parts of India, the Act has been made enforceable from time to time.¹ But the Act could not be made applicable in Punjab as yet. The result is that at present, the Transfer Property Act is enforceable throughout the Country except Punjab.

PUNJAB

In Punjab this Act is not applicable. Transfers of immovable property by 'of parties' in Punjab are regulated by the rules of equity, justice and good conscience. As discussed earlier, most of the provisions of this Act, particu

1. The Act was extended to the areas in Tripura and Vindhya Pradesh (now in M.P.) with effect from 16th April, 1950. In Kerala the Act was made applicable by Travancore-Cochin Act, 1955 and to Mysore (excepting areas in district Bellary) the Act was extended by Mysore Act, 1951. In Rajasthan, the Act was made applicable by notification in the Official Gazette, 1952.

those provisions which contain substantive law, are based on the principles of equity. Therefore, even though the Act is not enforced in Punjab and the courts are not bound to apply it yet, while deciding a case the courts normally follow the provisions of this Act in the name of equity, justice and good-conscience.² It may be noted that in Punjab although the Act is not applicable, the courts are justified in applying those provisions of the Act which deal with the substantive law because for the most part, these provisions are the statutory recognition of the principles of equity. But those provisions of the Act which deal with the technical rules of procedure in which there is no reference to the principles of equity, have not been followed by the Courts.³

While providing for extension of this Act to the areas where the Act is not in force, Section 1 empowers the State Government not only to extend the whole Act but also only some of its provisions. Moreover, the State Government is also empowered to extend the Act or a part thereof only to certain specified territories. But, where only selected provisions of the Act are made applicable to a territory, these provisions must be interpreted in the light of the whole enactment i.e. considering these provisions as integral part of the Act. An isolated different meaning cannot be given to that provision so as to abrogate any existing law in the territory which otherwise remains unaffected by this Act.⁴

Exemption and extension of specified sections.—Under Section 1, the State Governments are empowered also to exempt any part of its territory from the operation of Sections 54 (2, 3), 59, 107 and 123 of this Act. The State Governments may exempt either all the above mentioned sections or, only few of them. However, the language of Section 1 suggests that although the State Government may exempt the operation of the whole Act but as regards partial exemption, it may exempt only above mentioned specified provisions of the Act. These specified provisions, namely, Sections 54 (2, 3), 59, 107 and 123 relate to the registration of transactions of sale, mortgage, lease and gifts. It may be noted that provision for the registration of these transactions have been made in the Indian Registration Act, 1908 which is in force in all the cantonments of India.⁵ The result is that if certain areas in a State are exempted from the application of these sections, the registration of transactions of sale, mortgage, lease and gifts would not be necessary under the Transfer of Property Act. But as the Indian Registration Act is also in force, such transactions are to be registered under the Registration Act. Therefore, there would not be any practical difference if the above provisions of the Transfer of Property Act are not made applicable.

2. Repeal of Acts and saving of certain enactments, Incidents, Rights etc.—In the territories to which this Act extends for the time

2. *Namdeo v. Narmalabai*, A.I.R. 1953 S.C. 228; *Milka Singh v. Shankari*, A.I.R. 1947 Lah. 1.

3. *Rani Gopai Dula Singh v. Sardar Gurubux Singh*, A.I.R. 1955 Punj. 215.

4. *Ma Mi v. Kallandar Aminul*, A.I.R. 1927 P.C. 22.

5. See Cantonments Act, 1924 Section 287.

being the enactments specified in the Schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

- (a) The provisions of any enactment not hereby expressly repealed;
- (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;
- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability; or
- (d) save as provided by Section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of a decree or order of a court of competent jurisdiction;

and nothing in the second chapter of this Act shall be deemed to affect any rule of Mohammedan Law.

SYNOPSIS

- Repeal of Acts and Saving of Rights etc.
 - Acts and statutes not expressly repealed.
 - Terms or incidents of contract or of constitution of property.
 - Rights, liabilities or reliefs created before commencement of this Act.
 - Transfers by operation of law.
- Section 57 and Chapter IV Exempted from savings.
- Rules of Muslim Law.
- Govt. Grants Excluded.

Repeal of Acts and Saving of Rights etc.—Before the commencement of the Transfer of Property Act, 1882, the transfers of property in India were governed by the principles of equity and certain statutes in the form of Regulations. After this Act, there was no need of old law on this subject and the statutes were no more required. Accordingly, Section 2 of the Transfer of Property Act, 1882, provides for the repeal of old law and statutes dealing with transfer of property. But, while repealing the earlier statutes, Section 2 saves certain pre-existing enactments and also some of the rights and incidents of property which accrued before the promulgation of this Act. It is significant to note that the expression "nothing herein contained shall be deemed to affect" in this section means 'nothing contained in the Transfer of Property Act, it refers to

the whole Act rather than Section 2 alone.⁶ The provisions of this Act do not affect, in particular, the following statutes and rights or incidents of property etc.

(ii) *Acts and Statutes not expressly repealed*.—Only those enactments, Regulations and provisions thereof are repealed by this Act which are expressly mentioned in its schedule to have been wholly or partially repealed therein.⁷ Other Acts, Statutes or Regulations which have not been expressly repealed under the Schedule, still prevail. For example, the Bengal Regulation VIII of 1819 has not been repealed, therefore, the *patti* tenures which are governed by this Regulation remain unaffected by the provision of the Transfer of Property Act.⁸ Similarly, since the Bombay Land Revenue Code has not been repealed by this Act, therefore, surrender of land under a *Kabuliyat* and *Razinama* as provided under the Code would not be affected by contrary provisions of the Transfer of Property Act.⁹ The Oudh Laws Act, 1876 and the Punjab Laws Act, 1872 incorporate certain local customs and usages prevailing in their respective areas and give statutory recognition to them. Since these Acts are still in force, the customs and usages mentioned in these enactments remain unaffected even though they are contrary to the provisions of this Act.¹⁰

(b) *Terms or incidents of contract or of constitution of property*.—Terms or incidents of any contract or of constitution of property has also been saved provided they are permissible under the law for the time being in force in India and are not inconsistent with the provisions of the Transfer of Property Act. 'Incident' signifies a 'thing naturally attached to' and 'constitution of property' means 'essential nature of property'. Pre-emption is a right which appertains to an immovable property, therefore, this right is saved from the mischief of this Act. Pre-emption is recognised as a legal right in India and is also not contrary to the provisions of the Transfer of Property Act. Similarly, partition is a permissible right of every co-owner of a joint-property; it is naturally attached to a property in which there are several owners. Therefore, partition remains unaffected by the provisions of this Act and shall be valid even if it is made orally. Mortgagee's right to claim the expenses incurred properly in the maintenance and management of the mortgaged property is an

6. *Ulfat Hossain v. Gyant Dass*, (1909) 36 Cal. 802 : 3 I.C. 994. However, in *Naba Krishan v. Mohit Kati*, (1909) 9 I.C. 840 a contrary view was taken.

7. The Schedule of the Transfer of Property Act, 1882 provided a list of Statutes, Acts of Governor-General in Council and Regulations which were in force before the promulgation of this Act and are now repealed either wholly or partially. Four Statutes dealing with uses, fraudulent transfers and clandestine mortgages are repealed wholly. Act IX of 1842 of the Governor-General in Council has been repealed as whole while in the remaining Acts, only specified sections have been repealed. Bengal Regulation I of 1793 and Bengal Regulation XVII of 1806 have been wholly repealed. In the Bombay Regulation V of 1827, only section 15 stands repealed.

8. *Surendra Narain Sinha v. Bijoy Singh*, A.I.R. 1925 Cal. 962.

9. *Motibhai v. Desai*, (1917) 41 Bom. 170.

10. It may be noted that Transfer of Property Act itself has protected certain local customs under Sections 36, 98, 106 and 108. The provisions of law under these sections are subject to any custom and usage to the contrary.

implied term of a mortgage. Since such claims are permissible under Order XXXIV, Rule 10 of the Civil Procedure Code, 1908, they shall remain unaffected.¹¹

(c) *Rights, liabilities or reliefs created before commencement of this Act*.—The Act is not retrospective. Therefore, the rights or liabilities (with respect to any property which existed before commencement of the Act) shall remain unaffected. There is a general rule that unless a contrary intention is expressly indicated, a new enactment is not retrospectively applicable.¹² Clause (c) of Section 2 lays down this general rule with regard to the provisions of Transfer of Property Act.¹³ This clause provides that the Act is prospective and the rights, liabilities and reliefs which were created before the commencement of this Act shall not be affected by any contrary provisions of this enactment. In other words, the Act is not retrospective in its operation. The rights, liabilities or any remedy thereunder which already vested out of any legal relationship before this Act was enforced, remain in tact even if they are against any provision of this Act. It has been held that a tenancy which was non-transferable before 1882 shall not become transferable under Section 108 (i) of the Transfer of Property Act because this Act is not of retrospective operation.¹⁴ Similarly, if a mortgage executed before the commencement of the Act was valid without attestation, it had not become invalid for want of attestation under Section 59 of this Act.¹⁵

However, the rule of prospective operation of a new Act is applicable only to substantive rights and liabilities. The provisions of the Transfer of Property Act may, therefore, apply retrospectively in the matters of procedure. It may be noted that rights, liabilities and reliefs, as such, are one thing and the *method or procedure* for obtaining them is a different thing. Rights and liabilities which were already vested have not been affected by this Act and have been preserved by Section 2(c). But, the method or form of procedure to be followed for enforcing such pre-existing rights has not been saved by this clause. The provisions of this Act may be applied to procedural matters. Thus, in a mortgage executed before this Act, the rights of a mortgagee say, for the sale of the mortgage-property, is a substantive right and has been saved but filing of the suit and the procedure to be followed thereafter must be in accordance with the provisions (Sections 61 and 67-A) of this Act.¹⁶

(d) *Transfers by operation of law*.—The Transfer of Property Act is not applicable to transfers by operation of law. Preamble to this Act, makes it clear

11. *Venkatayulu v. Dhanalakshmi*, (1914) 16 Mad. L.T. 365.

12. 'Nona constitutio juriis formam imponere debet non proteritias' (A new law should impose future, not in past).

13. Section 6 of the General Clauses Act, 1897 also lays down a similar rule.

14. *Sarda Kanta v. Nabin Chandra*, A.I.R. 1927 Cal. 39.

15. *Jalihar v. Mukund Deb*, (1912) 39 Cal.

16. *Murji Dhar v. Parsaram*, 25 Bom. 101; *Ramachandrar Koor v. Mahomed Mehdi Hussain Khan*, (1) 26 Cal. 39; *Shree v. Janu*, (1892) 15 Mad 290.

that the Act is meant to regulate the transfers of properties only by 'act of parties'. Section 2(d) further makes it clear that except as provided in Section 57 and Chapter IV, the Act shall not affect any transfer by operation of law or a person's properties devolve upon the heirs or legatees by operation of the law of inheritance or the law of wills, as the case may be. The transmission of property in these cases does not take place under this Act. Transfer of Property by an order of the Court is not a transfer by act of parties and as such, the Act is inapplicable to these transfers. In a Court-sale, the property is transferred by operation of law and the ownership of the property vests in the purchaser without any registered deed as required under Section 54 of this Act. Similarly, transfer of a debt (which is transfer of actionable claim) in the execution sale under the authority of Court is also excluded and Section 135 of this Act is inapplicable to such sales.¹⁸ In the insolvency proceedings, the property of insolvent vests in the Official Receiver. This vesting is a Transfer of Property Act and not applicable. Therefore, for the vesting of insolvent's property in the Official Receiver no formal sale-deed (duly registered) is necessary as is required under this Act. But in the auction-sale by the Official Receiver, sale of property in favour of the highest bidder has been held to be a sale by act of parties to which this Act is applicable and a formal sale-deed is required under Section 54 of the Act.¹⁹

Transfers by 'operation of law' having been excluded by the Transfer of Property Act would also mean that if any provision of any special Act, is in conflict of this Act (T.P. Act) then the provisions of the special Act, for the time being in force shall prevail over the provisions of the Transfer of Property Act. In *Harish Chandra Hegde v. State of Karnataka*,²⁰ some provisions of the Karnataka Scheduled Caste and Scheduled Tribe (Protection of Transfer of Certain Land) Act, 1979, was contrary to Section 51 of the Transfer of Property Act (rights of bona fide holder under defective title to receive value of improvement). The Supreme Court held that the rights under Section 51 of the Transfer of Property Act (which is a General Act) is not available when the transfer is declared void under the Karnataka Act (special Act). The Supreme Court observed that the provision of the Karnataka Act "would apply, notwithstanding anything contained in any agreement or any other Act for the time being in force." The Karnataka Act is a special Act whereas the Transfer of Property Act is general Act and in view of the matter also Section 51 of the

17. Although the transfers by operation of law have been excluded from the jurisdiction of this Act yet, the principles underlying some sections, e.g., Sections 36, 44 and 53 have been applied to cases on such transfers.

18. *Krishnan v. Perachan*, (1892) 15 Mad 382, cited in *Mulla: TRANSFER OF PROPERTY ACT ED. IX* p. 12.

19. *Narasappa v. Hussain Sah*, AIR 1935 Mad 55; *Abdul Hashim v. Amar Krishna*, (1919) 46 Cal. 887. However, a contrary view has been expressed by the Chief Court of Oudh in *Waziray v. Malhara Prasad*, AIR 1939 Oudh 55, where the Court held that auction-sale by an Official Receiver under the authority of Court is a transfer by operation of law and is valid without a registered sale deed.

20. AIR 2004 SCW. 315.

Transfer of Property Act will have no application and the consequences contained in provisions of Karnataka Act would prevail."

Section 57 and Chapter IV Exempted from savings.—Clause (d) exempts Section 57 and Chapter IV from the savings. What has been saved under Section 2 (d) is not applicable to Section 57 and Chapter IV of this Act. Section 57 deals with discharge of encumbrances on sale by order of court and Chapter IV deals with mortgage and charges. It may be noted that under Section 57, encumbrances on sale may be discharged by order of Court or in execution of a decree so that the property sold may be free from liabilities. Such discharge is possible only by order of the Court which amounts a 'transfer by operation of law' which is saved under clause (d). Without exempting Section 57 from the savings under this clause, this section would have been infructuous. Similarly, in Chapter IV special provisions have been laid down for transfer and extinction of mortgagor's interest by a decree of the Court. As such, such transfer of interest may be called as a transfer by operation of law. But as a result of exemption under this clause to Chapter IV, the provisions of this Chapter are made applicable to such transfer. Further, because of the exemption of Chapter IV to the savings under this clause, Section 100 of this Chapter which deals with charges is applicable also to transfers by order of that Court.²¹

It is significant to note that Section 5 of the Transfer of Property Act which defines a 'transfer' for purposes of this Act, excludes transfer by operation of law. Whereas, exemption under clause (d) means to suggest that with regard to Section 57 and Chapter IV the Act is applicable. There is, therefore, an apparent conflict between the provisions of Section 5 and the exemption of Section 57 and Chapter IV from the saving of transfers by operation of law under clause (d) of Section 2. In *Larmi Devi v. Mukund Kanwar*,²² the Supreme Court has held that there is no such conflict because with regard to the exemption of Section 57 and Chapter IV the provision of Section 2(d) overrides the definition of transfer of property given in Section 5 of this Act.

Rules of Muslim Law.—The concluding part of Section 2 saves contrary rules of Muslim personal law from application of Chapter II of this Act. Chapter II of the Transfer of Property Act contains rules relating to transfers generally, irrespective of the mode of transfer and the kind of property transferred. For example, provisions regarding transferability of property (Section 6), vested and contingent interests (Sections 19, 21), rule against perpetuity (Section 14), doctrine of election etc. are applicable whether the property transferred is movable or immovable and the mode of transfer is sale or gift or exchange etc. Specific modes of transfers such as sale, gift, exchange, lease and mortgages have been dealt with separately in other Chapters. The exemption from the application of Transfer of Property Act is with regard to only those rules of Muslim personal law which relate to any provision of law

21. *Lala Nand Kishore v. Municipal Board Agra*, AIR 1943 All 115 (F.B.); *Mama Singh v. Wasti Ram Sangh*, AIR 1960 Punj. 296.

22. AIR 1965 S.C. 834.

contained in Chapter II. For example, Muslim law of family-waks is contrary to the rule against perpetuity as laid down in Section 14 of this chapter. As a result of this exemption, the family-waks are valid even though they are contrary to the provisions of Section 14.

However, other chapters of the Act have not been exempted. Therefore in the cases of sale, exchange, lease, mortgage and transfer of actionable claims the provisions of this Act are applicable also to Muslims and Muslim law of sale or exchange is not applied. As regards gifts, Section 129 expressly exempts gifts by Muslims from the application of Chapter VII (gifts) of the Act. Gifts made by Muslims are governed by Muslim law of *Hiba* and the provisions of this Act are inapplicable to such gifts. But, only the contrary rules of Muslim law have been exempted. In cases where there is no inconsistency between the rules of Muslim law and the provisions of law in Chapter II of this Act, the provisions of the Act are to be applied. In *Mohammad Raza v. Abbas Bendi Bibi*,²³ the Privy Council had applied Section 10 of this chapter to a transfer under family arrangement and held that a condition restraining further transfer to a person outside the family was not absolute restraint and was, therefore, valid. In this case the parties were Muslims.

Before 1929, the concluding part of Section 2 exempted also the contrary rules of Hindu law and Buddhist law. The Amending Act 20 of 1929 has deleted that part of Section 2 which exempted Hindu or Buddhist law because inconsistencies under these laws have now been removed by this amendment. It may be concluded that at present, only the contrary rules of Muslim law are exempted from the application of Chapter II and gifts made by Muslims are exempted from the application of Chapter VII of the Act.

Parents jointly executed deeds and their children who were donees were given properties on a specific undertaking by them that they would not claim any right on the remaining properties. The document was accepted by the donee children and registered. That fact was held to be sufficient for the conclusion that they were estopped from any share in the property remaining in the hands of the youngest son who was the only one with his father at the time of the latter's demise. The Court said that the document in question was not hit by Section 6.²⁴

Govt. Grants Excluded.—The Transfer of Property Act does not apply to Government Grants.²⁵ Section 2 of the Government (Crown) Grants Act, XV of 1895, provides that nothing contained in the Transfer of Property Act shall apply to any grant or other transfers of land made by or on behalf of Government in favour of any person.

3. Interpretation Clause.—In this Act, unless there is something repugnant in the subject or context,

23. A.I.R 1932 P.C. 158

24. *Hison Khanat Ranzhar v. Mahammad Ranzhar*, AIR 2008 Ker 1128.

25. *West Bengal v. Birendra Nath*, A.I.R. 1955 Cal. 601; *Dewan Prasad v. Kallikern*, (1955) Nag. 538.

"immovable property" does not include standing timber, growing crops or grass;

"instrument" means a non-testamentary instrument;

"attested", in relation to an instrument means, and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;

"registered" means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents;

"attached to the earth" means—

- (a) rooted in the earth, as in the case of trees or shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; or

- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property, shall be deemed to have notice of such instrument as from the date of registration or,

where the property is not at all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or the property wherein a share or interest is being acquired, is situated:

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

SYNOPSIS

- The Interpretation Clause.
- Immovable Property.
- Land.
- Benefits to arise out of land.
- Things attached to the earth.
 - things embedded in the earth.
 - things attached to what is so embedded in the earth.
 - things rooted in the earth except—
 - standing timber,
 - growing crops, or
 - growing grass.

- Examples of Immovable Property.
- Examples of Movable Property.
- Importance of the Nature of Property.
- Instrument.
- Attested.
- Object of Attestation.
- Who can Attest?
- Essentials of Valid Attestation.
- Form of Attestation.
- Registered.
- Actionable Claims.
- Definition of Actionable Claim.
 - Unsecured money debt.
 - Claim to beneficial interest not in possession of the claimant.
 - Transfer of actionable claims.
 - Instances of actionable claims.
- Claims or rights which are not actionable claims.
- Notice.
 - Actual or Express Notice.
 - Constructive Notice.
- Importance of Notice

The Interpretation Clause.—In the beginning of almost every enactment there is a section in which there are definitions of selected words and phrases which have specific meaning with reference to that enactment. Such section is called 'the interpretation clause' i.e. the section dealing with definitions. Section 3 of the Transfer of Property Act is the interpretation clause of this Act. This section defines certain important words and phrases which have been used in the Act frequently. Section 3 contains definitions of immovable property, instrument, attested, registered, attached to earth, actionable claims and notice. The intention behind giving these definitions is to give specific meaning to these words with reference to the Act. In other words, wherever these words are used in the Transfer of Property Act, they are to be interpreted as defined here. No other meaning can be given to them. Words and expressions defined in Section 3 are explained below.

IMMOVABLE PROPERTY

In Section 3, the definition of immovable property is neither clear nor complete. It simply says that immovable property excludes standing timber,

growing crops or grass. It is not clear as to what it includes. In any Act, if the meaning of any word is not given clearly, the meaning of that word may be found in the General Clauses Act, 1897, if given there. According to Section 4 of the General Clauses Act, immovable property includes land, benefits to arise out of land and, things attached to the earth. The definition of immovable property given in the General Clauses Act is applicable to the Transfer of Property Act.²⁶ But this definition is also not complete. Moreover, the expression 'things attached to the earth' which is not defined in the General Clauses Act has been defined separately in Section 3 of the Transfer of Property Act. It is necessary to consider the definitions given in Section 3 of the Transfer of Property Act as well as the definition given in the General Clauses Act. On the basis of the definition given in both these Acts, the expression 'immovable property' may be defined property in the following words.

Immovable property includes—

- (1) Land.
- (2) Benefits to arise out of land, and
- (3) Things attached to the earth, i.e.—
 - (i) things embedded in the earth,
 - (ii) things attached to what is so embedded in the earth,
 - (iii) things rooted in the earth except—
 - (a) standing timber,
 - (b) growing crops, or
 - (c) growing grass.

Land.—Land means surface of the earth. It includes everything upon the surface of land, under the surface of land and also above the surface of land. Anything upon the land, so long as it is not removed from there, shall be part of the land and as such an immovable property. Thus, soil or mud deposited on the surface of earth would be immovable property. The water collected in a pit or accumulated in the pond or lake is also immovable property because the water is part and parcel of the surface of earth. Water flowing in the river gives the impression that it is movable but its water always remains on the surface of the earth. Therefore, all the rivers have been regarded as part of the land and as such immovable property although the water is moving. Everything under the surface of land is also part of land and is included in the expression 'immovable property'. For example, sub-soil, minerals, coal or gold mines etc. The underground streams of water are immovable properties because they flow under the land. Therefore, they are included in the term 'land'. Moreover, not only the things on the land and under the land are immovable properties, but the 'space' which is above the land is also part of land and is an immovable

property. Looking closely, we see that space begins just from the surface of land and goes up to sky, as if it has been placed on the land. Thus, being part and parcel of the land, the space above the land is also immovable property.²⁷ It may be concluded therefore, that immovable property includes land and land means and includes everything upon the surface of earth, under it and also above it.

Benefits to arise out of Land.—Besides land, the 'benefit' which a person gets from land, is also an immovable property. One may get a benefit from a land under some right. A right by the exercise of which a person gets certain benefits is called beneficial right or beneficial interest of that person. Beneficial interest in a property is called intangible or incorporeal property.²⁸ Thus, any right which is exercised over a land (or any other immovable property) and by the exercise of which a person gets certain profit or gain, would be his intangible immovable property. For example a piece of land is immovable property, therefore, if any right is exercised by a person upon that land, that right becomes intangible immovable property of that person. As discussed earlier, word 'land' is here used in wider sense. It means and includes everything upon its surface such as house, pond or river. It also includes everything beneath the land such as minerals or mines etc. Thus, right of way exercised on the land or a right to use a land under lease or tenancy is an immovable property. Therefore 'right of a tenant to live in the house of his land-lord is an immovable property of the tenant. Similarly, right of fishery i.e. right to catch fish from a pond or river, is also an immovable property. It may be noted that the water in the pond or river is an immovable property, therefore, everything in this water including fish shall also be immovable property. And since the right of fishery is exercised on 'fish in the water', which is an immovable property, therefore, this right is an immovable property. Right of ferry means right of transportation on rivers or lakes by boats or steamer. Since river or lake-water is an immovable property and boats or steamers are used on such waters, therefore 'right of ferry' has been held to be an immovable property. Similarly, since land also includes everything beneath its surface such as mines, therefore, the right to extract coal or gold or minerals etc. from the mines is also an immovable property.

Things attached to the Earth.—The expression 'things attached to the earth' has been defined separately in Section 3 of the Transfer of Property Act. Things attached to the earth means (i) things embedded in the earth (ii) thing

27. Owner of an open piece of land is, therefore, also the owner of the space. But because it is not practically possible to get it separated from the land and give it separately to another person who is not the owner of the land, it would be against the nature of this thing (i.e. space) to transfer it. Therefore, although space which includes also air and light is an immovable property, it is not transferable under section 6(4)(i) of the Transfer of Property Act.

28. Properties are generally classified as movable and immovable. But besides this classification there is another classification of properties. Properties may also be 'tangible' and 'intangible'. Tangible or corporeal properties are those properties which have physical existence and can be seen or touched e.g. land, house, table etc. Intangible or incorporeal properties are in the form of rights under which one gets certain benefits. They have no physical existence. Existence of such properties (beneficial right) can be known only when they are being exercised.

attached to what is so embedded in the earth, and (iii) thing rooted in the earth.

(i) *Things embedded in the earth*.—Things which are fixed firmly in the earth and become part of the land are things embedded in the earth. For example, houses, buildings, walls, or electricity poles are immovable properties because they are things embedded in the earth. Walls and houses are not just placed on the surface of the land; the surface of the earth is dug deep and thereafter the whole structure is fixed permanently. Where the things are just placed on the surface of the earth without any intention to make them part of the land, the things may not be immovable properties even if they appear to be fixed in the land. For example, heavy things such as anchor, road-roller or a heavy stone placed on the land may go two or three feet deep into the earth by virtue of their own weight. But such things are not annexed to or embedded in the earth. Therefore, the anchor fixed to the land in order to stop the movement of a ship and a road-roller embedded a few feet deep into the land or other heavy things which are fixed in the land only due to their own weight, are not things attached to earth.²⁹

A machinery which is attached to a concrete base by nuts and bolts to fix it firmly, cannot be regarded as a thing embedded in the earth because machinery is not fixed or attached to the land with intention of any beneficial enjoyment of the land where it is installed. As a matter of fact, machineries or other installations of business are fixed to the land for commercial purpose only. They are, therefore, regarded as accessory to the business and not an annexation to the premises.³⁰ Large vessels were fixed in a distillery for brewing liquors. It was held by the Court that the vessels (vats) were movable properties because they were fixed in the land not with the intention of any beneficial enjoyment of the land as such; they were fixed for trade purposes.³¹

(ii) *Things attached to what is so embedded in the earth*.—Where a thing is attached to something which is embedded in the earth for its permanent beneficial enjoyment, the thing so attached would also become immovable property. Doors, windows or shutters of a house are attached to its walls for permanent enjoyment of that house. Therefore, the doors, windows and shutters are regarded as immovable properties. Things imbedded in the earth are immovable properties because they become part of the land. Things permanently attached to what is so embedded would also be part of a thing

29. Whether a thing is embedded in the earth or has simply been placed on it, would depend on the fact whether the thing is intended to be a part of the land or not. Such intention can be inferred from mode as well as the purpose of annexation. Thus, an anchor which is fixed in the ground to hold a ship is not immovable property but the same anchor fixed firmly in the land to hold a suspension bridge would become an immovable property. *V.P. Bakiruddin Haji v. State Bank of India*, AIR 2009 Ker 78, the title deed assigned immovable property without mentioning the house built on it, the assignee obtained title to the house because things attached to the earth would go with it.

30. *Mulla: TRANSFER OF PROPERTY ACT*, Ed. V, p. 27.

31. *Narayanam Sa v. Balagurusami*, AIR, 1924 Mad. 187; See also *State Bank of Patiala v. Chohan* *Hobhoni* (India) Pvt. Ltd. AIR, 1953 H.P., 27.

which in itself is a part of land. Accordingly, doors or windows are regarded as part of the house which is part of the land. However, it may be noted that the thing attached must be (a) attached permanently and must also be (b) attached for the beneficial enjoyment of the house or building. Things attached without any intention of making them a part of the house or building would not be immovable properties. For example, electric bulbs, window-screens or the ornamental articles are movable because such things are attached to walls not for the permanent beneficial enjoyment of the house but only for the use and enjoyment of the 'things' itself.

(iii) *Things rooted in the earth*.—Trees, plants or shrubs which grow on land are rooted in the earth. With the help of their roots, they keep themselves fixed in the earth and become part of the land. Until cut down the trees are permanently attached to the land where they are grown. Therefore, a general rule in respect of all the trees, plants, herbs and shrubs is that they are immovable properties.³² However, there is an exception to this general rule. Standing timber, growing crops and grass, though rooted in the earth, are movable properties.

Standing Timber.—Standing timber is movable property. A green tree rooted in the earth is called a 'standing timber' provided its woods are generally used for timber purposes i.e. for making houses or household furniture. If there is a tree, the woods of which are fit to be used, for making doors, windows or furniture, the same tree which under general rule is an immovable property, shall be treated as 'standing timber' and as such a movable property. For example, the woods of *Shesham*, *neem*, *babool* or teak trees are used for making houses, doors, tables or chairs, therefore these trees have been held to be movable properties although they are rooted in the earth.³³ Bamboo trees have no utility except that they may be used in making houses or as poles, therefore, bamboo trees have been held to be movable properties.³⁴

Fruit-bearing trees are not standing timber. They are planted and grown for taking fruits etc. from them and not for taking their wood. Therefore, fruit-bearing trees are immovable property.³⁵ *Mahua* tree has been held as an immovable property.³⁶ Similarly, palm or date-trees which are used exclusively for taking their fruits or drawing toddy from them, have been held immovable property.³⁷

There are certain trees, for example, a mango-tree, which give us fruits but their wood is also used for timber purposes. Whether such trees are standing

32. But as soon as a tree or plant is cut down it is detached from the land and is no more a part of the land. Therefore, a cut down tree or a tree which falls on the ground otherwise, shall be treated as movable property.

33. *Bafinath v. Ramdhar*, AIR, 1963 All. 214; *Ramtunur v. Krishna Gopal*, AIR, 1946 Oudh 106; *Kushiyam v. Ahmed Kufly*, AIR, 1952 Mad. 39.

34. *State of Orissa v. Thegaur Paper Mills Co. Ltd.*, AIR, 1965 S.C. 1293.

35. *Moti Singh v. Doshi Singh*, AIR, 1936 Pat. 46.

36. *Chand v. Sri Manu*, AIR, 1925 Oudh 108.

37. *Sheik Jan Mohammad v. Unnath Mishra*, AIR, 1962 Pat. 441.

timber (i.e. movables) or not depends upon the intention of its owner. If its owner intends to keep the tree growing and green for ever, the tree is not standing timber even if its woods are fit to be used for furniture etc. On the other hand, if the owner intends that the tree is to be cut down soon for utilising its wood, the green tree would be standing timber.³⁸ In *Siamti Bai v. State of Bombay*,³⁹ the Supreme Court held that if the owner of a tree is interested in the further vegetative growth of the tree (i.e. intends to keep the tree alive) it is a 'tree' (immovable); but if it is intended that the tree is to be cut reasonably early, the tree is a standing timber (movable).

Growing Crops and Grass.—Growing crops and growing grass are movable properties. Growing crops means crops standing in the field. Although in the field yet, they are not immovable property because every crop is bound to be cut in the near future when it becomes ripe. The crops in the field have no use except their produce. The crops of wheat or paddy etc. and also the vegetable crops of potato etc. are, therefore, movable properties. Sugarcane crops⁴⁰ and the crops of indigo (*neel*)⁴¹ have been held movable property. Crops include creepers. Crops of grapes and the crops of betel leaf (*pan*) etc. are also movable properties.

Like crops, the growing grass rooted in the earth is also a movable property. Grass in the field has no other utility except that it could be used as fodder for the cattle. For this reason it is bound to be cut down or be grazed by some animals. No further vegetative growth may be intended by the owner of the land upon which the grass is grown. However, since the right to cut grass is a right exercised upon the land, this right is a 'beneficial' interest in the land and as such an immovable (incorporeal) property.⁴²

Examples of Immovable Property

Besides well known types of immovable property given above, there are several interests or rights which have been recognised by the Courts as immovable property. Some of such immovable properties are :

- (1) Beneficial interests arising out of land, for example, right of way⁴³ or an easement.⁴⁴
- (2) Rights under lease or tenancy.⁴⁵

38. Where A sells a mango-tree to B and B purchases it so that he and his children may enjoy its fruits, the sale is the transfer of immovable property. But if B purchases the tree in order to cut and remove the tree for making house or furniture, the sale is transfer of movable property.

39. A.I.R. 1958 S.C. 532.

40. *Kalka Prasad v. Chaudan Singh*, (1858) 10 All. 20.

41. *Enashtar v. Sant Lal*, (1887) 10 All. 133; *Misri Lal v. Mazhar Hossein* (1886) 13 Cal. 262.

42. *Soni Chetlar v. Santhubhai*, (1907) 20 Mad. 58 (F.B.).

43. *Bejoy Chaudan Nig v. Banka Bank*, (1908) 4 L.C. 116.

44. *Mahabhar Rao v. Kashi*, 1 L.R. 34 Bom. 287.

45. *Municipal Corpn. Raseing v. Lala Panichan*, A.I.R. 1965 S.C. 1008.

- (3) Rights to extract gold, silver, coal or other minerals from mines.⁴⁶
- (4) Right of fishery i.e. right to catch and collect fish from a pond, tank, lake or river.⁴⁷
- (5) Right of ferry i.e. right of transport through rivers.⁴⁸
- (6) Right to collect dues from fair or *hat*.⁴⁹
- (7) Right to hold exhibition or fair on one's land.⁵⁰
- (8) Right to take forest produce e.g. *tendu* leaves etc. and soil for making bricks.⁵¹
- (9) Right to collect *Lac* from its trees.⁵²
- (10) Mortgage-debt i.e. a loan secured by mortgaging an immovable property.⁵³
- (11) Equity of redemption.⁵⁴
- (12) Office of the hereditary priest of a temple and also its enrolments.⁵⁵
- (13) Right of a *Maha Brahmin* to receive dues at a funeral.⁵⁶

MOVABLE PROPERTY

A property which is not immovable is movable. Movable property has not been defined in the Transfer of Property Act. Section 3 of the Act excludes standing timber, growing grass and the crops from the definition of 'immovable property'. This simply means that standing timber, growing grass or crops are movable property because what is not immovable may be movable. The General Clauses Act, 1897 defines movable property as "property of every description except immovable property". According to Section 2(9) of the Registration Act, 1908 movable property includes standing timber, growing crops and grass, fruits on trees, fruit-juices in the fruits on the trees and the property of every description except immovable property. Besides well known movable properties

46. *Kumar Peshupati Nath v. Sri Shankar Pd.*, A.I.R. 1957 Cal. 128.

47. *Bihar Fishermen Co-operative Society v. Sipahi Singh*, A.I.R. 1977 S.C. 2149; *Satoel Jaiswal v. State of M.P.*, A.I.R. 1996 S.C. 207.

48. *Krishna v. Akelunda*, (1885) 13 Mad. 54.

49. *Sikandar v. Bahadur*, I.L.R. 27 All. 462.

50. *Ganpati v. Ajmer*, (1955) S.C.R. 1065.

51. *Mahadeo v. State of Bombay*, A.I.R. 1959 S.C. 735.

52. *Kamal Singh v. Kati Methon*, A.I.R. 1955 Pat. 402.

53. *Permal v. Permal*, A.I.R. 1921 Mad. 137. However, for purposes of attachment and execution of decree under the Civil Procedure Code, it is treated as movable property. *Lal Uma Rao v. Lal Singh*, A.I.R. 1924 All. 796.

54. *Unesh Chandra v. Zahur Futima*, I.L.R. 18 Cal. 164 (P.C.); *Farrs Kam v. Govind*, (1897) 21 Bom. 226.

55. *Raghuo v. Kassy*, (1883) 10 Cal. 73; *Krishnabhai v. Keshabhai*, 6 B.H.C.R. 137.

56. *Suth Lal v. Bishambhar*, (1917) 39 All. 196. However, 'Yajman Vritti' i.e. right to collect offerings from 'yajmans' is not immovable property.

such as tables, chairs, cars etc. Following properties and interests have been regarded as movable properties because they are not immovable property.

Examples of Movable Property

1. Standing timber, growing crops and the growing grass.
2. Things placed on the land or attached to it without any intention of making them a permanent part of the land e.g. a machinery attached to land but capable of being shifted from that place is movable property.⁵⁷
3. Government Promissory Notes.
4. Royalty,⁵⁸ or, copyright.
5. Right of worship i.e. right to offer prayers.⁵⁹
6. Yajman Vritti i.e. right to receive offerings in cash or kind from the Yajmans.⁶⁰
7. Payments made to Pandas by the pilgrims.⁶¹
8. Decree for the arrears of rent.
9. Decree for sale of any immovable property on a mortgage.⁶²
10. Right to get maintenance allowance even if its payment is a charge on some immovable property.⁶³
11. Right to enjoy the usufruct (benefit) of fruit trees e.g. right to enjoy palm nuts.⁶⁴

Importance of the Nature of Property

Properties may be movable or immovable and tangible or intangible. The Transfer of Property Act provides specific rules of procedure for transfer of these different kinds of properties.⁶⁵ Movable properties may generally be transferred by delivery of possession, writing and registration is not essential. But immovable properties are required to be transferred generally through written and registered document. Besides other things, the validity of a transfer depends also upon the fact whether the procedure prescribed for that kind of property has been followed or not. If the procedure prescribed by the Act has not been followed, the transfer is void. For a valid transfer of property it is necessary, therefore, that first of all its nature (or kind) is definitely known so that the prescribed procedure could be followed. For example, under Section 123 of the Act, gift of an immovable property must be made through registered

57. *State Bank of Patiala v. M/s Chohan Hunteam Ltd.*, A.I.R. 1962 H.P. 27.
 58. *Krishna Kishore v. Kusumda Mysali Collector*, A.I.R. 1972 Pat. 36.
 59. *Eastern Co. Roy v. Monomohini Das*, 4 Cal. 683; *Jagada Singh v. Ram Saran*, 6 Pat. 245.
 60. *Kodulal v. Bedanilal*, A.I.R. 1932 Strd 60, 137 I.C. 136.
 61. *Badrishna v. Sahayram*, A.I.R. 1947 All. 391.
 62. *Jivan Ali v. Bani Mal*, 9 All. 108 (F.B.).
 63. *Alij Begum v. Brij Narain*, A.I.R. 1929 All. 281.
 64. *Sulaim Ahmad v. State of Madras*, A.I.R. 1954 Mad. 949.
 65. Refer to sections 9 generally and in particular to sections, 54, 58, 107, 118, 123 and 130.

document but the gift of movable property may be made only by delivery of possession. Accordingly, gift of a tree (which is immovable property except where it is standing timber) is not lawful if it is made without a registered deed. But if the same tree could be proved to be a 'standing timber', the gift of such tree is valid even if it is made without registration. Similarly, sale of intangible property (e.g. reversion) is valid only when it is made through a registered document.

INSTRUMENT

Instrument means a legal document. Where a property is transferred through any written document, that document is called 'instrument'. Section 3 of the Transfer of Property Act defines 'instrument' as a non-testamentary instrument. This clearly means that the term 'instrument' as used in this Act excludes testamentary document (i.e. a document of will). Transfer of property under testamentary instrument or will takes place only after the death of the testator (one who makes the will). Transfer of Property Act is applicable only to transfers taking place between living persons i.e. where transferor and transferee both are alive on the date of the transfer. It excludes transfer under will. Accordingly, the term 'instrument' as used in this Act shall mean only that document which transfers a property between the living persons.

It may be noted that 'instrument' as used in the Act signifies the transfer of property as such; it is not only a written proof or evidence of the transfer of property mentioned in it.⁶⁶ Thus, where a gift of an immovable property is made through a registered document, the registered document is called as the instrument of gift. Now, this instrument is not only the evidence or proof of the fact that a gift has been made but, because there is no other mode of making a gift of immovable property, this document would signify also the transaction of gift itself.

ATTESTED

A property may be transferred either orally i.e. by delivery of possession or, through a written document. Where a property is transferred through document, the transferor is said to execute the deed (or document) of transfer. Such transferor is called the executant.

It is necessary under the law that two persons must affirm, or become witness to the fact that executant, and no body else, has written or signed the deed of transfer. This act of giving evidence or becoming witness is called attestation and when these persons have done so, the deed is said to have been attested. The witnesses are called attesting witnesses.

Object of Attestation.—Attestation of a document ensures the authenticity or truthfulness of its execution. The object of attestation is two fold. First, it confirms that executant and none else has executed the document. Secondly, it also confirms that the executant has executed the document with free consent and there was no force, fraud or undue influence. There is no other

66. *Indraharman v. Kameshwar*, (1890) 13 Mad. 281.

purpose behind attestation. By attesting a document, the attesting witnesses do not confirm that they have knowledge of the contents of that document.⁶⁷ Nor are they supposed to have given consent to the transfer under the document.

Who Can Attest?—Any two persons who are of the age of majority and possess sound mind, can act as attesting witnesses. Since attestation is a special act of certifying the signature of the executant, any other person e.g. the scribe or the typist cannot be presumed to have attested the document. However, a scribe (writer or typist) may perform dual role. In that case scribe shall put his signature mentioning specially that he is also attesting the document. A person who has been called simply to identify the executant and who has not seen the executant signing the deed, cannot be treated as an attesting witness.⁶⁸ Similarly, the Sub-Registrar or the Registering Officer who registers the document, cannot be presumed to have acted also as attesting witness. But the Sub-Registrar too can perform the double role and act as attesting witness provided he has *intention* to act also as attesting witness and has either personally seen the executant signing the document or the executant has accepted the execution before him.⁶⁹

A party to the transaction cannot be an attesting witness. The parties to the transfer are transferor and the transferee. The transferee cannot attest the document. If there are several transferors or several transferees then neither any one of the transferors nor any one of the transferees may act as attesting witness. Attestation by any party to the transaction is invalid. However, a person who is not a party to the transaction but is a party interested in the transaction is competent to become an attesting witness. For example, where X takes some loan from Y by mortgaging his immovable property, the parties to the mortgage deed are X (mortgagor) and Y (mortgagee). Now, if Y lends Z and gives the full amount to X then Z would be a person who is interested in the mortgage deed although he is not a party to it. Z can act as attesting witness of the mortgage deed. In *Kumar Harish Chandra v. Bansidhar Mohanty*,⁷⁰ there was a mortgage in which the money was advanced not by the mortgagee himself but by a third party. The deed of mortgage was attested by this third person who had advanced (given) the money. It was held by the Supreme Court that although the money lender (who gave the money to mortgagee who finally gave it to the mortgagor) was a person interested in the transaction of mortgage but could not be regarded as a party to it. Accordingly, the attestation by the money lender was held valid. A person who is authorized to transfer the properties of another under the power of attorney, executes the deed of transfer himself on behalf of the person who appoints him. Therefore, he is himself a party to the transaction and cannot be an attesting

witness to the document which he has executed on behalf of other under the power of attorney.

Essentials of Valid Attestation.—According to Section 3 of the Transfer of Property Act, following essential conditions are necessary for a valid attestation—

- (1) The attestation must be done by two or more persons. Attestation by only one witness is not valid.
- (2) Each attesting witness must (a) see the executant signing the instrument (document) or fixing his mark (thumb impression) on it or (b) see some other person signing the instrument in presence of and under the direction of executant or (c) has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person.⁷¹
- (3) Each attesting witness has signed the instrument in the presence of the executant.

Since the object of attestation is to authenticate the genuineness of the executant of the document, it is necessary that the executant signs or puts his thumb impression in the presence of the attesting witness. When the executant signs the deed in the presence of witnesses, the witnesses become sure that the deed has been signed by genuine person and there was no force or fraud. However, where the executant is unable to sign the deed himself, he may direct some other person to do so. In such circumstance the attesting witness authenticates and ensures that the 'other person' has signed the deed strictly under the direction of the executant. Instead of signing the deed in the presence of witnesses, if the executant acknowledges or admits before the witnesses that he has himself signed the deed or admits that he got it done under his supervision, the attestation is valid. In other words, if the attesting witness accepts the executant's admission of signing the deed, it shall be treated as if the witness has seen the executant signing the deed.

It may be noted that not only the executant should sign the document in presence of the attesting witnesses but the witnesses too should sign it in the presence of the executant.⁷² Accordingly, attestation cannot take place before executant's signature. However, the attesting witness as need not be very near to executant. Even if the attesting witness is at a distance from where he can see the witness signing the document, the attestation would be regarded to be in presence of the executant. In *Lalia Kundan Lal v. Mushrafi Begum*,⁷³ the executant was a *pardanashin* lady who was sitting behind a curtain. She took

67. *Sunder Kuer v. Shakti Uday Ram*, A.I.R. 1944 All. 42.

68. *Dharamdas Mondal v. Kashi Nohi*, AIR 1959 Cal. 243.

69. *Venkata Sastri v. Raghava B.*, A.I.R. 1952 Mad. 111; *M.L. Abdul Jabbar v. Venkata Sastri*, A.I.R. 1956 S.C. 1147.

70. A.I.R. 1965 S.C. 1738.

71. *Lalibhai Jagannath Popat v. Pragadevi Jannadas Kataria*, AIR 2009 SC 1389 'will', only one attesting witness examined, who typed and who scribbled not known, 'will' produced from the custody of one attesting witness, how he came to possess it, not explained, whether the attesting witnesses signed in the presence of each other or otherwise, not known, held, 'will' surrounded by doubtful circumstances, execution not proved.

72. *Ahimsa Chandra v. Dissanayake*, A.I.R. 1929 Cal. 123.

73. A.I.R. 1936 P.C. 207.

her hand out of that curtain and put her thumb-impression on the deed which was seen by the witnesses. Thereafter her husband signed the deed and then it was signed by the attesting witnesses. It was held by the Privy Council that the attesting witnesses have signed the deed in the presence of the executant (lady).

Whether the attestation of a document is valid and is to be accepted by Courts or not, is a mixed question of fact and law. If no objection regarding the validity of attestation or execution of a duly registered deed has been raised earlier, it cannot be raised in appeal on the ground that it is a 'pure question of law'. Therefore such objections cannot be raised, for the first time, in appeal.⁷⁴

Form of Attestation.—The Act does not prescribe any formality for attestation. Signature of the attesting witness is sufficient. Signature need not be at any particular place in the deed. Attesting witness may sign anywhere on the deed. Where the witnesses are illiterate and cannot make signatures, they may attest the deed by putting their thumb-impressions. It is also not necessary that both the attesting witness should sign the deed simultaneously. Each attesting witness may sign and attest the deed separately. However as stated earlier, since the witnesses testify the executant of the deed it is necessary that they must sign the deed after the executant has signed it.⁷⁵

REGISTERED

Registration is a process through which a document is officially recorded. It takes place under the provisions of the Indian Registration Act, 1908. When a document is registered, it becomes an important and valuable evidence regarding the statements made in the document. Under the Transfer of Property Act, certain transfers must be made only through a registered deed. For example, gift of an immovable property of any valuation, sale of immovable property above rupees one hundred, simple mortgage etc. can be made only through a document duly attested and registered. In other words, the deeds of such transfers are compulsorily registrable. Section 17 of the Registration Act provides a list of documents which are compulsorily registrable. On the other hand, there are certain documents, dealt with under Section 18 of the Registration Act, the registration of which is optional, e.g., Wills, sale of immovable property of valuation less than one hundred rupees etc. Where a document is compulsorily registrable but has not been registered, the transfer under it is not valid and courts do not recognise that transfer. But, where registration is optional, e.g., wills, the transfer is valid even though the deed is unregistered.

Briefly stated, the procedure for registration of a document is as under. The transfer which is to be made through a deed is first of all, written on the stamp-papers of prescribed value. Thereafter, the executant puts his signature and two attesting witnesses attest the execution. This document, which is now duly

executed and attested, is presented before the Sub-Registrar or Registering Officer having appropriate jurisdiction. The Sub-Registrar, after taking the statements of the executant and the identifying witnesses and also the thumb impression of the executant on appropriate register admits the deed for registration. The registration-fee prescribed under the law is also charged. The document is then recorded (copied or its duplicate is filed) in the prescribed register. After these formalities, the Sub-Registrar certifies on the back of the deed that the document has been duly registered on the date and time mentioned by him. After affixing the official seal, the deed is returned to the parties concerned. It may be noted that the deed is deemed to be registered not on the date on which it was admitted for registration. It is deemed to be duly registered on the date and at a time which is mentioned by the Sub-Registrar under his certificate. It is also to be noted that registration must have been completed in all respects strictly according to the provisions of the Indian Registration Act. However, once a document has duly been registered, the Registering Officer (Sub-Registrar) has no authority to modify or, delete any entries made in any of the books of record relating to validity of that document. Therefore, on a subsequent date he cannot delete or modify any entry made in the 'encumbrance certificate' except where it relates to a clerical error.⁷⁶

Section 3 of the Transfer of Property Act provides that if a document is duly registered in any part of the country to which this Act extends, it would mean to have been 'registered' for other places too. In other words, court would accept a registered document as evidence irrespective of the fact as to where it was registered.

ACTIONABLE CLAIMS

Tangible movables such as tables or cars have physical existence and can be possessed. But intangible movables being in the form of rights, have no physical existence and cannot be possessed. The existence of a tangible movable can be known simply by its physical presence, but the existence of intangible movable property may be known only when the person having such interest claims it by maintaining an action in a court of law. For example, if A has a table, it can be known by seeing the possession of table with A. But if A has right or claim to get back the money given by him to B, then A's claim can be known only when he files suit against B for the recovery of his money. In other words, A's claim against B can be known only when he maintains action in a Court of law. It may be stated, therefore, that beneficial interest of a person in some movable property is an actionable claim of that person.

The definition of actionable claim was included in Section 3 of the Transfer of Property Act in 1900. Before this, the Anglo-Indian Courts following English law⁷⁷ used to give a wide meaning to this term and it included every kind of

76. *M. Ramkrishna Reddy v. Sub-Registrar, Bangalore*, AIR 2000 Kant. 46.

77. Under English law movable properties are classified as (1) 'those in possession' or those properties which are capable of being possessed i.e. tangible and (2) 'those in action' or, those properties which are in the nature of beneficial interest in movables (i.e. intangibles); these properties may be claimed only by an action in a court of law.

74. *Brij Raj Singh v. Sewak Ram*, AIR 1999 S.C. 2203.

75. *Sant Lal v. Kamla Prasad*, A.I.R. 1951 S.C. 417.

claim in a movable property which could be enforced through the courts. But such a wide meaning created confusion. For example, under this meaning all debts whether secured or unsecured were actionable claims whereas a debt secured by mortgage of immovable property is, strictly speaking, an 'interest in land'. Similarly, under this meaning any claim of money whether the amount was fixed amount or uncertain, was an actionable claim. Because of such confusions, there used to be conflicting decisions and the law was neither clear nor uniform. Accordingly, a clear and definite meaning of the term actionable claim was included in Section 3 of the Transfer of Property Act by the Amending Act II of 1900. The definition of actionable claim given in Section 3 now limits the scope of this term.

Definition of Actionable Claim

According to Section 3, actionable claim means :

- (1) unsecured money debt, and
- (2) a claim to beneficial interest in movable property not in possession of the claimant.

(1) Unsecured money debt.—A debt may be secured or unsecured. Where the creditor (the person who gives loan) takes security from the debtor (the person who takes the loan) for repayment of his money, the debt is secured debt. If debtor gives the security of his immovable property, the debt is secured by way of mortgage. Where security is some movable property, it is pledge or hypothecation. On the other hand, if there is no security of any movable or immovable property, the debt is unsecured. When a person takes some loan and simply writes a promissory note, the debt is an unsecured debt. According to Section 3 only unsecured debt is an actionable claim. Debt secured by way of mortgage, pledge or hypothecation is not an actionable claim. It may be noted that 'debt' here does not mean only 'loan'. Any obligation to pay a certain or definite sum of money may be called a 'debt'. For example, claim of 'arrear of rent' is an actionable claim. 'Debt' may be *existent, accruing or conditional*.

Existent Debt.—Where a debt or sum of money has already become due and is payable (enforceable) at present, the debt is existent. For example, claim of arrears of maintenance allowance or the claim of arrears of salary is existent debt because a definite sum of money has already become due in the past and now it is payable.

Accruing debt.—Where a debt or sum of money is at present due but it is payable not now but on a future date, the debt is accruing. Accruing debt is due at present but becomes payable only on a future date. For example, if A promises to pay Rs. 100 to B as maintenance allowance on fifth of every month, the claim of B against A is an accruing debt before fifth of that month. Similarly, the claim for salary to fall due in the next month is an accruing debt and as such an actionable claim.⁷⁸

An actionable claim may be existent in *present*, accruing, conditional or contingent.⁷⁹

Conditional or Contingent debt.—Where the claim for a sum of money exists but the payment depends upon the fulfilment of any condition, the debt is conditional. If A promises to give Rs. 1,000 to B provided he marries C within one year, then B's claim to Rs. 1,000 is conditional because it is subject to a condition to be fulfilled by him in future.

Similarly, where the claim of money is subject to some uncertain future event which may or may not happen, the claim is contingent. For example, where A promises to give Rs. 1000 to B provided B's first child is a son, the claim of B for Rs. 1000 is contingent claim (debt).

(2) **Claim to beneficial interest not in possession of the claimant**.—Right of a person to take the possession of a movable property from the possession of another, is the actionable claim of that person provided claimant has beneficial interest (i.e. right of possession) in that property. Following requirements are necessary for constituting an actionable claim—

- (a) The claim is to some movable property.
- (b) The movable property is in possession of another person.
- (c) The beneficial interest or the right of possession of the claimant is recognised by the Court.

A person can claim possession of a movable property of which he has right to possess but it is not in his possession. If a property is already in his actual or constructive possession there is no question of claiming its possession. Therefore, if a movable property is proved to be in actual or constructive possession of the claimant, there is no actionable claim. Moreover, the claimant must also have right of possession i.e. the law recognises that he has beneficial interest in that movable property. If he has no legal right of possession, the claim is not actionable claim.

Illustrations

- (i) A has sold fifty bags of wheat to B. The bags of wheat are in the godown of A. B's right to take possession of the bags of wheat from the godown of A is his (B's) actionable claim.
- (ii) A has fifty bags of wheat in his godown. A has not sold these bags to B or the contract of sale is not valid. B has no beneficial interest in those bags of wheat. Claim of B, if made by him, is not his actionable claim.
- (iii) A is owner of some elephants. Somehow these elephants are trapped on a land. The land is owned by A he has no actual knowledge of this fact, A's right to recover elephants trapped on that land is not his actionable claim because elephants (movables) are already in his constructive possession.⁸⁰

78. *Poothekka v. Annammalai*, A.I.R. 1926 Mad. 1173.

79. *Sunrise Associates v. Govt. of Delhi*, AIR 2006 SC 1908.
80. *Renu Krishna v. Kirtikol*, (1888) 11 Mad. 445.

Transfer of actionable claims

Beneficial interest in movable property is intangible movable property. Therefore, actionable claim is regarded as property. It can be transferred. Provisions for the transfer of actionable claims are given in Chapter VIII of the Transfer of Property Act.

Instances of actionable claims.—Some of the claims recognised as actionable claims are :

- (i) Claim for arrears of rent.⁸¹
- (ii) Claim for money due under insurance policy.⁸²
- (iii) Claim for return of earnest money.⁸³
- (iv) Right to get back the purchase-money when the sale is set aside.⁸⁴
- (v) Right of a partner to sue for an account of the dissolved partnership firm.⁸⁵
- (vi) Muslim woman's claim for her unpaid dower.⁸⁶
- (vii) Right to claim benefit under a contract for the purchase of goods.⁸⁷
- (viii) Right to get the proceeds of a business.⁸⁸

Claims or rights which are not actionable claims.—Some of the claims which are not recognised as actionable claims are given below:

- (i) Right to get damages (uncertain sum of money) under the law of torts or for the breach of a contract.⁸⁹
- (ii) Claim for *misre profits* (i.e. claim of produce of profit of a disputed property by decree holder who was not in possession of the property).⁹⁰
- (iii) Copyright of a book or any other original work of skill e.g. invention is not actionable claim because it already vests in the person who has it.⁹¹ Patents and trade marks are in the same category. They are intangible properties. They can be assigned in accordance with their own governing Acts. They are not transferable.

- (iv) Although a debt is an actionable claim but the debt passed into a judgment i.e. a decree or judgment of debt is not actionable claim because no further action is to be maintained for its recovery.⁹²
- (v) Where a decree provides for a future decree, this future decree is also not actionable claim.⁹³

NOTICE

Notice means knowledge or information of a fact. Where a person has knowledge of any fact or it could be proved that under the circumstances he must have knowledge of that fact, he is said to have notice of that fact. If it is established before the Court of law that a person has notice of some fact or transaction, the knowledge of that fact is binding on him. He cannot deny the knowledge of that fact if it goes against him. Notice may either be (i) actual i.e. express or (ii) constructive.

Actual or Express Notice

Actual notice means direct or express knowledge or information about something. Actual notice is a matter of fact. That is to say, whether a person has actual notice of a fact or not can itself be proved or disproved on the basis of certain other facts. Express notice is binding on a person only under certain conditions. Following requisites are necessary for an express notice.

- (i) The knowledge or information must be definite. It must not be hearsay or rumours. If a person comes to know about certain facts by way of rumours or through casual conversation between some persons, this knowledge is not legal because no person is bound to take notice of rumours. The knowledge of the fact must be of such a nature which a normal man would be expected to take seriously⁹⁴ so that he may do or may not do (abstain) something in future. Unless the mind of the person has in some way been brought to an intelligent appreciation of the nature of the thing, there is no notice.⁹⁵ Every notice means knowledge of a fact but every knowledge is not treated as notice.
- (ii) Only the knowledge of the parties interested in the transaction is actual notice regarding that transaction. Knowledge or information of any other person who is stranger to the transaction is no notice.
- (iii) The knowledge or information must be about or related to the transaction in question. Knowledge of something which is not relevant for a transaction cannot be taken to be actual notice for that transaction.

81. *Dewan Datt v. Champa Datt*, AIR 1960 Cal. 378.
 82. *Varjitam Das v. Megann Lal*, AIR 1937 Bom. 382; *Sunrise Associates v. Govt. of NCT Delhi*, AIR 20th SC 1908 : (2006) 5 SCC 603, includes insurance claims, partnership claims, right to sue for the benefit of a contract not complied with any liability, arrears of rent, etc.
 83. *Lakshmi v. Hussaini*, (1927) 97 IC 257.
 84. *Chinnayapattil v. Venkatarangayya*, AIR 1942 Mad. 209.
 85. *Bharnat Prasad v. Pans Singh*, AIR 1967 All. 15.
 86. *Amin Hassan Khan v. Muhammad Nazir Hussaini*, AIR 1932 All. 345.
 87. *Zaffar Achbar Ali v. Budget-Budget Jute Mills*, (1907) 34 Cal. 289; *Shah Miraji v. Union of India* AIR 1957 Nag. 31.
 88. *Alkesh Ali v. Naiti Bank*, AIR 1951 Assam 56.
 89. *Motilal v. Rastogi Lal*, (1933) All. 642; *Jinder v. Raghunath Singh*, (1930) 5 Luck. 547.
 90. *Jai Narayan v. Kishan Dutta*, AIR 1924 Pat. 551.
 91. *Savitri Devi v. Dhanraj Prasad*, (1939) All. 71.

92. *Gowindarajulu v. Ranga Rao*, AIR 1921 Mad. 113.
 93. *Jugalshankar Samal v. Ram Cotton Co. Ltd.*, AIR 1955 S.C. 376.
 94. *Lloyd v. Banks*, (1868) L.R. 3 Ch. 488 at p. 490.

Constructive Notice

Doctrine of constructive notice is based on equity. Where a person actually does not know anything about a fact but the court treats that under the constructive. There are certain circumstances in which the court presumes that under those circumstances a person should be taken to have knowledge of that fact.

The circumstances are of such a nature that the Courts of law would construe that he has no express or actual notice of the fact. This is called presumption by the Courts or legal presumption. Legal presumptions cannot be denied or controverted. Constructive notice is a legal presumption and is like a provision of law the knowledge (notice) of which cannot be denied by any person. It is a matter of law which cannot be rebutted or disproved. In *Plumb v. Fluit*, Eyre C.B. observed thus:

"Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted."⁹⁵

Constructive notice is, therefore, imputed to or imposed upon a person under legal presumptions. The legal presumption of constructive notice is made by the Court under the following circumstances:—

(i) *Wilful abstention from an inquiry or search*.—Wilful abstention from an inquiry or search means deliberately avoiding to take notice of a fact which a reasonable man would have taken in the normal course of life. If a person refuses to accept a registered envelop addressed to him, it is his wilful abstention from taking notice of the contents of that envelop. In such a situation the law presumes that he must have knowledge that the contents of the letter are against his interest and because of this reason he is avoiding to accept that letter. This is nothing but lack of *bona fide* intention on his part. Wilful abstention in this section has been construed to mean want of *bona fides* as distinguished from mere omission to make enquiries.⁹⁶ Therefore, a person who refuses to take a registered letter shall be imputed with constructive notice of its contents and he cannot take the plea that he does not know its contents.⁹⁷

Actual notice of a deed (written document) is constructive notice of the contents and all other deeds to which it refers as affecting the same property.⁹⁸ If a person is purchasing certain immovable property and the seller has shown him the title deeds which mention that the property was partitioned property

95. (1791) 2 Aust. 432 cited in *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VII, p. 23.

96. *Kusaulai Ammal v. Sarbana Mulhah*, A.I.R. 1941 Mad. 707.

97. *A.E.K. Kaliappa Nadar v. S.V.K.R. Ananthavula Vandannal*, A.I.R. 1973 Mad. 255; (1973) 1 M.L.J. 126.

98. *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VI, p. 30.

with certain conditions, the purchaser shall be imputed with notice of the fact of partition and its conditions. He cannot be allowed to plead that he was ignorant of the conditions. If a purchaser omits to inspect a title deed, although he will actually not be able to know its contents but the Court shall presume that he knows all the facts given in the deed.⁹⁹ The presumption of the Court in such a circumstance would be that the person imputed with notice has designedly or purposely abstained from inquiring into the contents of the deed with the intention of avoiding to take its notice.¹ In *Bailey v. Barnes*,² Lindley L.J. rightly observe that:

"In dealing with real (*immovable*) property as in other matters of business, regard is had to the usual course of business. And a purchaser who wilfully departs from it, in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted the business in the ordinary way."

Constructive notice is inferred only where a person has means of knowing a fact but has omitted to know it. In other words, there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it.³ Where a person has no means or opportunities to get information about a thing, notice cannot be imputed on him about that thing. Where a purchaser had not the slightest idea or suspicion of any earlier agreement entered into away from the place where property in dispute is situated, it cannot be said that there was wilful abstention on the part of the purchaser.⁴

Illustrations

- (a) A registered letter was sent by landlord A to his tenant B. B refuses to take delivery of the letter. B has constructive notice of the contents of the letter because he has wilfully abstained from knowing its contents.
- (B) A contracts to sell his house to B. The house is on rent and B knows that the tenants have been paying the rents to C. B has constructive notice of the right of C to take rents from the tenants.⁶
- (c) A sells his house to B. The sale-deed mentioned that the house had fallen in A's share after a partition. The partition-deed had reserved a right of pre-emption. B has constructive notice of the right of pre-emption.⁷

99. *Mahomed Yunus Khan v. Courts of Wards*, A.I.R. 1937 Oudh 301.

1. *Mamji v. Hoortani*, (1910) 35 Bom. 342.

2. (1894) 1 Ch. 25 at p. 35, cited in *Shah's PRINCIPLES OF THE LAW OF TRANSFER*, Ed III, p. 61.

3. *Ram Coomer Coondoo v. Macqueen*, (1872) 11 Beng. L.R. 46.

4. *Harek Chand v. Sahani*, A.I.R. 1990 Raj. 109.

6. *Hunt v. Luck*, (1902) 1 Ch. 429; See *Shah's PRINCIPLES OF THE LAW OF TRANSFER*, Ed III, p. 60.

7. *Abdul Razak Routher v. Abdul Rahimur Sahib*, A.I.R. 1933 Mad. 715.

(d) A mortgages his property to B and says that the title-deeds are placed in the bank for safe custody. B, the mortgagee, does not make any inquiry as to why the deed is placed in the bank and does not see it. B shall be affected with notice of the pledge if it is proved that the deed was placed in bank not for safe-custody but for pledge to the bank.⁸

(e) A purchases two properties X and Y from B. A does not pay the full price to B. In the meantime he sells property X to C and informs him of B's charge for unpaid price. C has constructive notice of B's charge.

After one year A sells also property Y to C but C does not inform B about the unpaid price. C shall not be imputed with notice of the unpaid price which was given to him in the earlier transaction.

(ii) *Gross-Negligence*.—Negligence means carelessness. It is the omission to do (i.e. not doing of) something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would do and doing something which prudent and reasonable man would not do.⁹ Mere negligence or ordinary carelessness in taking notice of a fact is not 'gross-negligence'. There is no constructive notice in simply being negligent to take notice of a fact. But, if the negligence is so grave or gross that a man of common prudence can never be expected to do, the negligence is 'gross'. Gross negligence is blameworthy under the law and is never excused. It means carelessness of so aggravated nature as to indicate an attitude of mental indifference to obvious risks. Formerly, gross-negligence was regarded as evidence of fraud.¹⁰ But, since fraud necessarily implies that there is no carelessness but a designed purpose or bad intention, therefore, now a gross-negligence is not regarded as evidence of fraud.¹¹ It is carelessness of grave nature but without any *malafide* or bad motive.

It may be noted that instances of gross-negligence and 'wilful abstention from enquiry' are almost similar. But, theoretically there is distinction between the two. If A purchases the property of B, he is expected to inspect the title deeds of B respecting that property. In normal course, since A purchases property i.e. takes ownership from B, he has a duty to know whether B has that ownership or not. If he omits to do so, it shall be presumed that he has knowledge that contents of the deed might be against his interests. For example, the deed mentions certain conditions and when A becomes owner of that property he could say that he is not bound by these conditions because he did not inspect the title-deed. This suggests lack of *bona fide* intention on his part. But suppose A takes loan from B by depositing his title-deeds. Possession of title-deeds with B is the only security for repayment of money given by him

8. *Imperial Bank of India v. Lt. Col. Gyan*, A.I.R. 1923 P.C. 211.

9. *Byali v. Birmingham Water Works*, 11 Ex. 712. Cited in *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XIII, p. 36.

10. *Munindrachandran v. Trilokanath*, 2 C.W.N. 750.

11. *Lloyds Bank Ltd. v. P. E. Gunder & Co.*, A.I.R. 1930 Cal. 22.

to A. If B parts with the deeds and gives it to A before the loan is fully paid, the conduct of B is his carelessness of such a degree which cannot be excused. In this example, there is not lack of *bona fide* intention; the intention of B is *bona fide* but his conduct is so negligent that it cannot be protected by law and he would not be allowed to say that he did not know that parting with the deeds would mean losing the money. Moreover, the question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.¹² In the 'wilful abstention', opportunity of knowledge might be an important factor but in the case of 'gross-negligence' it is not relevant.

Whether constructive notice may be imputed to a person on the ground of his 'gross-negligence or not, depends upon the facts of each case. Conduct of a person in a given circumstance may be his gross-negligence while the same conduct in another circumstance may not be gross-negligence. In other words, duty to take notice of a fact may vary from case to case. In *Trilokanath v. Kriedan Lal*,¹³ the Privy Council held that before purchasing an immovable property, the omission to search the registers kept in the Registrar's office may amount to gross-negligence so as to attract the consequences which result from notice. But omission to inspect the title-deed of an adjoining property which the seller is under no obligation to produce for selling the present property, is not 'gross-negligence'.¹⁴ Normally where a property is situated in a municipal area, the purchaser is expected to see the records of the municipality to assure that there are no arrears of taxes or other dues on that property because after sale they are to be liability of the purchaser. In *Ahmedabad Municipality v. Haji Abdul*,¹⁵ the Supreme Court held that omission of the transferee (purchaser) to inquire about the arrears of taxes is not gross-negligence in each and every case. Whether it would be a gross-negligence or not must be adjudged on the facts of each case.¹⁶

*Lloyds Bank Ltd. v. P. E. Gunder & Co.*¹⁷

G. deposited the title-deed of his property with a bank N to secure his overdraft (loan from bank). This was, therefore, mortgage by deposit of title-deed in which the only security of repayment of loan was the possession of the title-deed by the person who gave money. After sometime G asked the bank N that he was intending to sell the property and the purchaser wants to see the title-deed and after inspection of the deed by purchaser he would return the

12. *Mulla v. Transfer of Property Act*, Ed. VI, p. 32.

13. A.I.R. 1921 P.C. 112.

14. *Chaturbhuj v. Mansukhram*, A.I.R. 1925 Bom. 183.

15. A.I.R. 1971 S.C. 1201.

16. Earlier, the Allahabad High Court had taken the view that as a general rule, omission to inspect the records of the municipality was gross-negligence and if taxes are in arrears, the purchaser shall be imputed with constructive notice (*Munni Kishore v. Agra Municipality*, A.I.R. 1943 All. 115).

17. A.I.R. 1930 Cal. 22.

same to the bank. The bank N relying upon this statement gave the title-deed to G. But, after taking the title-deed G deposited it in another bank L and took another loan. Thus, it was second mortgage by G by depositing the same title-deed. The question arose whether the prior loan given by N was to be secured first or the second loan given by L which was at present in possession of bank L.

Held : It was held that since this was a mortgage by deposit of title-deeds in which the only security for the repayment of loan is the possession of title-deed, bank N committed gross-negligence in parting with the title-deed. N cannot be allowed to plead that it has no notice that G would take the deeds and deposit it in another bank. Thus, the mortgage of bank N was postponed to mortgage of bank L.

(iii) **Registration as Notice.**—Explanation I to Section 3 provides that registration of a document is notice of all the facts stated in that document. Where a document has been registered, it is presumed that all the persons concerned have constructive notice of the material facts affecting the property which are apparent in the deed or which can be reasonably inferred from its contents.¹⁸ Any person interested in the transaction which is registered under the provisions of the Indian Registration Act, 1908, cannot plead that he has no notice of the transfer made under that deed. It may be noted that Explanation I was added to Section 3 by the Amending Act of 1929. Before, 1929 the law whether registration amounted to constructive notice or not was not settled. According to some High Courts registration was constructive notice but according to others, it did not amount to notice. In *Tilakdhari v. Khedari Lal*,¹⁹ the Privy Council held that there was no general rule of law applicable in all the cases that registration amounted to notice; whether registration was notice or not depended upon the fact of each case. But in India since Registration Act provides compulsory registration of certain documents, therefore, this decision was found to be in conflict with the Registration Act. Because of this reason, Explanation I was added to make it clear that registration of those documents in which registration is compulsory under the Registration Act, amounts to notice as a general rule and in all the cases. Where registration of a document is compulsory, there is a duty to search and inquire into the facts of the document. In order that registration may be treated as constructive notice of its contents, following conditions are necessary—

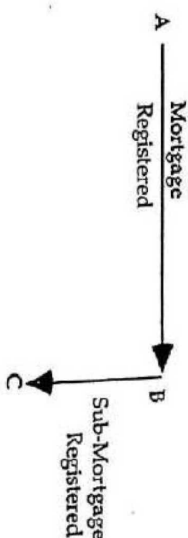
(1) Registration is notice only of those documents which are compulsorily registrable. Under Registration Act certain transfer *e.g.* gift of immovable property or simple mortgage etc. must be made only by registered deeds; they are compulsorily registrable. On the other hand, there are transfers in which registration has been made optional *i.e.* they may or may not be registered for example sale of movable properties or wills. Registration of documents in which registration is optional is not constructive notice. Thus, testamentary

documents (wills) do not come within the purview of notice as contemplated by Section 3, Expl. I because they are not required to be compulsorily registered.²⁰

(2) Registration amounts to notice only when all the formalities prescribed under the Registration Act are duly completed. As discussed earlier under the head "Registered", a document is deemed to be registered only on the date and time when the Sub-Registrar certifies and puts his signature and seal under Section 60 of the Registration Act. Therefore, registration amounts to constructive notice only from the date and time mentioned by the Sub-Registrar in his certificate stated above.

Where a property is situated in one sub-district and the rest in other district or sub-district, the Registration Act provides for sending a memorandum of the registration to the Sub-Registrar of the other district or sub-district where other properties are situated. In such cases registration operates as notice only from the date when such memorandum is received and filed by the Sub-Registrar where the property is situated. Provisos first, second and third to Explanation I make it clear that unless the registration has duly been completed under the provisions of Registration Act and all entries have been made correctly in the prescribed registers, it is not binding notice for a purchaser.

(3) Registration is notice only for a subsequent transferee. It does not amount to constructive notice for transferees (or persons interested in the transaction) prior to the registration of that transaction. For example, A mortgages his properties to B to secure certain loan taken by him. The mortgage is usufructuary mortgage in which B takes also the possession of that property. It is registered. B sub-mortgages that property to C through registered deed. To illustrate, these facts may be given as under :



Now, A pays debt to B without knowing that B has sub-mortgaged it to C. Here, the registered mortgage by A to B is notice for C because he is subsequent transferee. But, registered sub-mortgage by B to C cannot be notice for A and cannot deprive of the validity of payment of debt by A to B.

Punjab.—In Punjab where the Transfer of Property Act is not enforced, registration does not operate as notice in all the cases. Whether registration is constructive notice or not depends on the fact of each case.²¹ In Punjab, therefore,

18. *Rajinam v. Krishna Sani*, (1893) 16 Mad. 301.

19. A.I.R 1921 P.C. 112.

20. 24. *Paraguna's Lawyers's Assn. v. State of West Bengal*, AIR 1936 Cal. 205.

21. *Gulshan Fatma v. Kachore Singh*, AIR 1940 Lahore 26.

the law on this point is still the law laid down by the Privy Council in *Tilakdhari's* case discussed earlier.

(iv) *Actual Possession as Notice of Title*.—Actual possession of an immovable property is regarded as constructive notice of such title which the person in possession may have. Explanation II to Section 3 provides that any title, if any, of any person who is for the time being in actual possession thereof. For example, ²² A contracts to sell land to B for Rs. 5000/-. B takes possession of the land. Afterwards A sells it to C for Rs. 6000/-. C makes no inquiry of B of his interest and B may enforce specific performance of the contract against C. Thus, C cannot say that he has no notice of B's interest in the land. In *Blagden v. Kedar v. Dwarkanath K. Bagare*,²³ a subsequent purchaser (A) was residing in the vicinity (near) of a tenant (B) for more than 38 years. There was an agreement to sell in favour of this tenant. The Karnataka High Court held that the subsequent purchaser (A) had a constructive notice of the agreement of sale executed in favour of the tenant (B). The Court held that tenant (B) cannot be said to be a *bona fide* purchaser without notice of this agreement of sale. Thus, equitable relief cannot be granted to him (B).

Explanation II was added to Section 3 by the Amending Act, 1929. Before 1929, the law in India was not settled. According to the Allahabad, Bombay and Madras High Courts, possession of an immovable property amounted to constructive notice of such title as the person in actual possession may have. But, the Calcutta High Court took the view that possession of a property was not conclusive (final) proof but only cogent (convincing) evidence of notice. However, the controversy has now been resolved by Explanation II which incorporates the view taken by majority of the High Courts. Thus, the present law is that actual possession is constructive notice of the title or that much interest of the possessor which affects the transferee. Therefore, any person who wants to deal with any immovable property must ascertain whether the possessor has the title or interest in the property or not. If a person does not make such enquiries then he cannot be allowed to say that he had no knowledge that the title was not with the person who is in possession of the property.

It may be noted that possession operates as notice of the possessor's title or interest in the property would mean that if a person is in possession of a property, nobody can say that he has no knowledge of the 'fact of possession' by the possessor. Title here does not mean ownership. It simply means 'right to possess'. Actual or physical possession of a property is a fact which cannot be denied by a person who acquires that property. Instances of possession as notice occur mostly in cases of tenants who are in possession of the property under certain 'right to possess'. Explaining the law on this point in *Barnhart v. Green shields*,²⁴ Lord Kingsdown observed :

22. See Illustration (3) to Section 27 (b) of the Specific Relief Act.

23. AIR 2005 Kanl. 103.

24. (1853) 9 Moo. P.C. 18 at 32; See *Mitra's Transfer of Property Act*, Ed. VIII, p. 41.

".....the principle being that the possession of the tenant is notice that he has some interest in the land and that the purchaser having notice of that fact is bound, either to enquire what that interest is, or to give effect to it, whatever it may be."

However, possession by a tenant operates as notice only of his right of possession. Notice of tenancy is not notice of tenant's equitable right to have the tenancy agreement rectified.²⁵ Only actual possession operates as notice of the title of the possessor. If a person himself is in constructive possession of the property, the other person may not be imputed with notice as to his title in that property. Mere proof of payment of rent by a tenant without his being in actual possession of the property is no constructive notice of tenant's interest (i.e. his right to live) in the property.²⁶

Possession of a small portion of land is constructive notice only with regard to that portion. It cannot operate as notice for the whole land. Thus, possession of a small portion of a house cannot put a purchaser (of the house) on constructive notice of that person's rights as to the whole house.²⁷

In *Mohd. Mustajja v. Haji Mohd. Hissa*,²⁸ the Patna High Court observed that it cannot be said that the person who purchases a property must make enquiry about the previous contract from the plaintiff or any other tenant in occupation of a portion of the house. The Court held that the principle of constructive notice cannot be extended to a case where the person, who claims on basis of prior agreement, is in possession of only a small fraction of the property.

Normally, the principle of constructive notice on the ground of possession is not applicable in respect of the rights of third parties. But in certain cases where the state of the property is such that the rights of third party is necessarily affected, the rule of constructive notice is made applicable. For example, where the property is a burial ground (grave yard) the purchaser is deemed to have notice that the property exists for burial ground and would be affected by the right of burial in a third party. Similarly, if there is a shrine or tomb on the land to be sold, the purchaser will be put to an inquiry whether the land is *wakf* because if it is *wakf* the rights of third person (who may come to the shrine) is involved in the land.²⁹

The plaintiff entered into an agreement with two persons, defendants Nos. 1 and 2 for purchasing a site. The third defendant purchased the site from defendant No. 1. The plaintiff contended that the third defendant had notice of the agreement because of his son. Evidence showed that the relationship between the third defendant and his son was not cordial and therefore he could

25. *Mulla, TRANSFER OF PROPERTY ACT*, Ed. VI, p. 38.

26. *Kennuwall v. Hari Mohan*, 7 CWH 294.

27. *Manji v. Hoortul*, (1910) 35 Bom. 342.

28. AIR 1967 Patna. 5.

29. See *Mulla's TRANSFER OF PROPERTY ACT*, Ed VI, p. 40.

not be said to have notice of the earlier sale to the plaintiff. The Court said that actual notice must be definite information given in the course of negotiations by a person interested in the property. The third defendant had not willfully abstained from making enquiry or search. He was therefore a *bona fide* purchaser.³⁰

Illustrations

- (a) A leased a house and garden to B who takes possession of the properties. A then sells the said properties to C. C is deemed to have constructive notice of B's rights over these properties i.e. C cannot plead that he had no knowledge (notice) of the fact of B's possession on the properties.
- (b) A agrees to sell his property to B. On the basis of this agreement B puts his tenant in possession of that property. A afterwards sells the property to C. Here C cannot be said to have constructive notice of B's possession because B had no actual possession; the possession was with B's tenant.
- (c) A sold his land to B but remains in possession of the land as tenant of B. The sale-deed was not registered. A sold the same land to C under a registered sale-deed. C cannot be deemed to have constructive notice of B's rights over the land because B was not in actual possession of the land. C had no reason to believe that A was in possession of the land otherwise than as owner.³¹
- (d) A leased his land to B for seven years on March 1901 to B for seven years. In May, 1901 A entered into an agreement with B for the renewal of the lease on the expiry of the term of the lease. In July 1901 A purported to settle the same land with C for seven years from May 1908. C sued to take possession of the land on the ground that lease to B was now expired. Held, that C had constructive notice of the agreement because B was in actual possession of the land. Therefore, C was not entitled to get possession.³²

(v) *Notice to Agent is Notice to Principal.*—Notice or knowledge of a fact to any agent amounts to constructive notice to his principal. The principal cannot deny that the notice of the fact was to agent and not to him. The rule that a principal was bound constructively with notice of certain facts to his agent was added in Section 3 by Explanation III under the Amending Act, 1929. Notice to an agent is also called an *imputed notice*. It is called imputed notice because if a person authorizes some one to act as his agent for doing certain things, he is supposed to have control over the activities of that agent with respect to that thing. Where such agent does something beneficial to the

principal, it is obvious that principal would accept the knowledge of that act of his agent even though he has no actual knowledge (notice). But, where some act of that agent goes against the interests of the principal, he would take the plea that he had no notice of that act. In such cases the equity would not allow him to say that he has no notice of that 'act' of his agent. In other words, the notice in such circumstance would be imposed or *imputed* on him. The reason for this rule is that if were not so, every principal would be successful in avoiding unfavourable notice by appointing an agent.³³

This provision corresponds to Section 229 of the Indian Contract Act 1872 which runs thus:

"Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, has the same legal consequence as if it had been given to or obtained by the principal."

Before 1929, the words "given or obtained" were interpreted to mean that only actual notice to agent is constructive notice to a principal. Explanation III widened the scope of these words and now any kind of notice (actual or constructive) to agent is constructive or imputed notice to principal.

Following conditions are necessary for the applicability of the rule that notice to agent is imputed notice to principal—

- (a) Notice must have been acquired by a person as an agent; not in any other capacity. Unless it could be shown that there exists relationship of agency between two persons notice of one cannot be treated as imputed notice to another (principal).
- (b) Notice to an agent is imputed notice to principal only with regard to the particular business or transaction for which the agent has been appointed. A solicitor appointed for a particular business is agent for all matters related to that business and his knowledge or information respecting that business is notice to his principal. But where a solicitor is engaged only for writing a deed, his knowledge about the transaction in deed cannot be treated as notice to principal because he was appointed not for all dealings concerning that deed.
- (c) Notice must be acquired or obtained by an agent during the course of agency. Knowledge acquired by a person before his appointment as agent or after the termination of agency is no knowledge and is not imputed notice for the principal. Where a solicitor is employed for a business or transaction, his knowledge concerning that business is imputed notice to his employer. But knowledge of the same solicitor cannot be treated as imputed notice to the same employer if the knowledge by him was acquired during the course of any prior or

30. *N. Kasiinath (Dr.) v. Arjun R. Ram Mili*, AIR 2008 NOC 1620 Kar.

31. *Morshuwar v. Duttu*, (1883) 12, Bom. 569. See also *Pindie v. U Hpa*, AIR 1928 Rang 237 : 112 I.C. 230.

32. See *Kalyani v. Krishnan Nambiar*, AIR 1932 Mad. 305.

33. *Berrick & Co. v. Price*, (1905) 1 Ch. 632 : See A.K. Ray's TRANSFER OF PROPERTY ACT, Vol. I, E VIII, p. 149.

subsequent business.³⁴ However, if a principal ratifies i.e. approves any prior act of his agent, notice to that agent will be imputed to the principal because the effect of ratification is to constitute the agent an agent *ab initio* i.e. agent from the beginning.

(d) Notice acquired by an agent must be relevant or material to the transaction. Any knowledge obtained or acquired by an agent during the course of agency which is not material to the particular business for which agency exists, shall not be regarded as notice to the principal.

(e) Notice must not have been fraudulently concealed by the agent. Fraudulently concealment would mean that the agent has knowledge of certain facts related to the business but he has not communicated it to his principal with dishonest intention. It may be mentioned that normally a principal is bound by the knowledge (notice) of the agent whether the agent communicates it to principal or not. Whether the agent does not give information of any fact to his principal and the third party has also no knowledge of concealment of that fact, the principal is bound by the notice of the agent as against that third party. But where the third party and the agent both have knowledge of a fact and the fact is being concealed from the principal, the concealment would be a fraudulent concealment. In such cases, the principal is not bound by the notice to his agent. Proviso to Explanation III lays down clearly that if the agent fraudulently conceals the fact, the principal shall not be charged with notice against any person (third party) who was a party to or otherwise in the knowledge of the fraud. This proviso is, therefore, an exception to the general rule that notice to an agent is an imputed notice to his principal. In *Taras Co. Ltd. v. Bombay Banking Co.*,³⁵ A was employed as agent of both the companies, i.e., the Taras Company doing oil business and also the Banking Company. A paid off his personal overdraft (debt) in the Banking Company with the funds of the Taras Company. The Taras Company claimed that the knowledge of the ownership of the money used for the payment of the overdraft should be imputed to the Banking Company. It was held by the Privy Council that since the agent A had committed fraud, knowledge of ownership of the money used for payment of his private obligation (debt) could not be imputed to the Banking Company.

Partners.—Partners of a firm are agents of one another. Accordingly, notice of a fact to a partner with regard to the business of the firm is imputed notice to the firm.

³⁴ *See, Warden Building Society v. Rayner*, (1880) 14 Ch. D. 406; *Pankesh Narain v. Raja Binendra*, A.I.R. 1931 Oudh 333.

³⁵ *See Mullis's TRANSFER OF PROPERTY ACT*, Ed. VII, p. 42.

³⁶ A.I.R. 1919 P.C. 20.

Importance of notice.—The doctrine of notice is an equitable doctrine. It protects the interests of a transferee for value (with consideration) without notice. There might be transfers in which there is some legal defect and the transfer is void. Under a void transfer of property the transferee cannot get any interest. But, if it could be proved that transferee was a transferee for value (i.e., he has paid money) and he had no notice of the legal defect, the equity shall protect his interest under the doctrine of notice. For example, if out of a property a person has right to be maintained, and that property is transferred, the transferee would get the property with this liability. But, if it could be proved that transfer was for value and the transferee had no notice (knowledge) of this liability then, under Section 39 of the Act, the transferee would not be bound by the liability to maintain that person out of the property purchased by him. Other instances where under the Transfer of Property Act, interests of transferees for value without notice have been protected under the doctrine of notice are given in Sections 40, 41, 53, 53-A. It may be noted that the doctrine of constructive notice is applicable also against the Government.³⁷

Distinction between "notice" and "constructive notice".—A notice may be actual, express, implied or constructive. A direct notice or express notice are varieties of a factual notice. This is a matter of fact. A constructive notice, on the other hand, is not of any of the above kinds. It is not factual, but presumed or imputed. It is based on equity. It is inferred from circumstances which are on the equitable ground to be taken as amounting to notice, like notice to agent is notice to his principal; notice to a partner is a notice to the firm of which he is a partner. [For detailed knowledge see above].

4. Enactments relating to contracts to be taken as part of Contract Act.—The Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

And Section 54, paragraphs 2, and 3, 59, 107 and 123 shall be read as supplement to the Indian Registration Act, 1908.

As discussed earlier, the Transfer of Property Act, 1882 completes the Indian Contract Act, 1872 i.e. the Code of Contract because without being executed in the form of transfer of property for which the contract is made, the very purpose of contract remains unfulfilled. It is obvious that in a transfer of property there are elements of contract. Section 4 of this Act makes it clear that all such provisions of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872. Therefore, if there is any provision or word in the Transfer of Property Act which relates to contracts, the meaning of the provision or word shall be the same as given in the Indian Contract Act. For example, the word 'consideration' as used in the Transfer of Property Act shall be given the same meaning as laid down in Section 2(d) of the Contract Act. No

³⁷ *Secretary of State v. Dattatraya*, (1901) 3 Bom. L.R. 923.

other meaning can be given to it. Similarly, in deciding whether in a transaction a party has performed his obligations (i.e. his part of contractual obligations) the Court must consider his obligations under the contract. Wherever in the Transfer of Property Act it is provided that the transferor must have capacity to transfer the property, the 'capacity' is to be determined under Sections 10, 11 and 12 of the Contract Act. However, Section 4 of the Transfer of Property Act does not say that the provisions of the Contract Act are to be read into the Transfer of Property Act. That is to say, although the law of Contract may be part of the transfer of property but a completed transfer of property cannot be rescinded under Section 39 of the Indian Contract Act.³⁸

Second paragraph of Section 4 provides that Sections 54 (2, 3), 59, 107 and 123 shall be read as supplement to the Indian Registration Act, 1908. It may be noted that the above-mentioned sections of the Transfer of Property Act provide for the registration of documents under which these transfers are being made. For example, in the case of sale of immovable property of the value exceeding one hundred rupees or in the case of mortgage, lease and gift of immovable property, it is provided that the transfers are to be made through registered documents. Here, the registration of document and its procedure would be the same as laid down in the Registration Act. Further, since Registration Act itself provides for the registration of the above-mentioned transfers, the provisions of Sections 54 (2, 3), 59, 107 and 123 of the Transfer of Property Act are necessarily supplemental to the Registration Act, 1908.

II OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

(A) — Transfer of property, whether movable or immovable.

5. "Transfer of property" defined.—In the following sections transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons, and "to transfer of property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

SYNOPSIS

- Definition of Transfer of Property.
 - an act by which,
 - a living person,
 - conveys,
 - in present or future,
 - property,
 - to another living person.
- Family settlement.
- Compromise.
- Partition.
- Surrender.
- Release.
- Relinquishment.
- Charge.
- Property situated outside India.

Chapter II contains provisions for transfers of property by act of parties. Transfer by 'act of parties' means a transfer between two living persons. If a transfer is made by 'act' of parties, the person who transfers it and the person to whom it is transferred, both should be living persons at the date of the transfer.

38. *Nathulal v. Phoolchand*, A.L.R. 1970 S.C. 546.

39. *State of Kerala v. Cochin Refineries*, A.L.R. 1968 1361.

Where transfer takes place only after the death of the person whose property is being transferred, the transfer is by operation of law (of inheritance or wills). This Chapter and also the whole Act deals with transfers *inter vivos* i.e. transfers between living persons. Transfers by operation of law i.e. testamentary transfers are excluded from this Act.

Part (A) of Chapter II makes it clear that provisions contained in this part of Chapter II are applicable to transfer of properties whether movable or immovable. That is to say, although the Transfer of Property Act deals mainly with transfer of immovable properties, but certain provisions of this Act are applicable to the transfers of also movable properties. Sections 5 to 37 of this chapter are applicable to transfers of movable and immovable, both kinds of properties. These provisions deal with basic principles and concepts involved in any transfer. Nature or kind of property is not relevant or of any importance for the application of such provisions. For example, what is meant by transfer of property (Sec. 5) or when the interest of that property accrues to the transferee, (Secs. 19, 21) are basic questions irrespective of the nature of property. Similarly, what properties cannot be transferred (Sec. 6) or under what conditions a transfer can be made for the benefit of unborn persons (Secs. 3, 14) etc. are also such issues where the nature of property is irrelevant. Part (B) of this chapter contains provisions for the transfer of only immovable properties because the provisions laid down in Sections 38 to 53-A necessarily suggest that they can be applicable where the property is immovable.

Further, Chapter II contains provisions for the transfers generally i.e. irrespective of the kind of transfer of property. Transfers of property have been given specific names on the ground of special procedure or other differences in those transfers. For example, transfer of ownership in property in return of money has been given specific name 'sale' whereas if there is no consideration in the transfer of ownership, it is gift. Similarly, if instead of ownership only some of the interest in the property (i.e. right to live or use) is transferred, it is called 'lease'. These are all transfers of properties but of specific kinds: Chapters III to VIII of the Transfer of Property Act deal with 'specific transfers'.

Definition of Transfer of Property.—Section 5 defines 'transfers of property' in the following words:

'Transfer of property' means an act by which a living person conveys property in present or in future, to one or more other living persons (or to himself) and 'to transfer property' is to perform such act.

The analysis of this definition, makes it clear that transfer of property is:—

- (i) an act by which,
- (ii) a living person,
- (iii) conveys,
- (iv) in present or future,
- (v) property,
- (vi) to another living person or to himself.

(i) **Transfers of Property is an act.**—Transfer of property is an activity or process. Under this activity something is done by the person who wants to transfer his property; it is not transferred automatically without transferor's act as is the case in wills or inheritance. Transferring property would mean doing of this 'act' or performing such act. The legal effect of this act is passing of property from one person to another.

(ii) **Living Person.**—Transfer of property is to be made by a 'living person'. The person who makes the transfer is called the transferor. The transferor may be human person or a juristic person. Juristic persons are Companies, Firms, Corporation, University etc. which although are not human beings but law incorporates personality to them. The living person i.e. the transferor must be in existence at the time of making of the transfer. The transferor must also be competent i.e. of the age of majority, of sound mind and not otherwise disqualified to transfer a property. Second paragraph of Section 5 makes it clear that transferor may be one person or a class or group of persons. It may also be association of persons or corporations i.e. juristic persons. Court has not been regarded as 'living person' therefore, transfer made by the order to the Court (e.g. Court-sale) is not a transfer of property within the meaning of Section 5 of the Transfer of Property Act.¹ The transferor must be a living person means that the transfer of properties by operation of law i.e. under wills, inheritance or by court's order are excluded from this definition and are not to be regulated by the Transfer of Property Act.²

(iii) **Conveys.**—In a transfer of property the 'living person' i.e. the transferor conveys the property. His conveying is doing of the 'act' which is called transfer. There must be conveyance in every transfer of property. Conveyance means any act of the transferor by which certain new titles or interests are created in favour of the transferee (to whom the property is being transferred). The word 'conveys' includes any form of assurance *inter vivos* in which some new title or interest is created in favour of the transferee.³ In a transfer of property there is actually transfer of title to or interests in that property. Before transfer of property, the transferee does not have that particular interest which is given by the transferor. The transferee gets that of assurance by virtue of which transferee gets new title or interest which he did not have before the transfer, is called conveyance. For example A and B are owners of their houses. B has no title or interest in A's house. A does something (e.g. makes gift or sale) by virtue of which B becomes owner also of A's house. Here A's act is conveyance because this has the effect of creation of new title or interest (namely, the ownership also of A's house) in favour of B. Shah states that:

"In fact, the essence of the word 'transfer' is 'to convey', and therefore, a transfer of property would include any transaction which has the

1. *Baghiat Singh v. Jai Indan Bahadur Singh*, AIR 1919 P.C. 55.

2. Under will or inheritance the property is transferred from the testator or the properties only after their death, not when they are still alive. Court has not been regarded as a living person.

3. *Official Assignee, Madras v. Taimina Dinshaw Tehrani*, AIR 1972 Mad. 187.

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effect of conveying any property or any interest therein from one living person to another.^{6a}

The test as to whether a transaction is a transfer of property or not is whether that transaction passes on certain new rights or interests to the transferee or not? If no new interest is created in favour of the transferee, there cannot be transfer of property.

Conveyance necessarily implies that the transferor has the title or interest which he is transferring. He cannot convey an interest which he himself does not have at the time of conveyance.⁵ However, it is not necessary that the word convey or conveyance be specially used in the deed of transfer. It is sufficient if the deed shows that there is change of title or interest from transferor to transferee.⁶

The intention of the Legislature under Section 13 (b) is that the sale of secured asset is to be confirmed specifically by the secured creditor, and not by an authorised officer. So long as the sale is not confirmed by the secured creditor, the transfer of the secured asset does not become effected. The borrower has the right to redeem property at any time before the date that the property is transferred to the auction purchaser by confirmation of sale by the secured creditor.^{6a}

A mere agreement to sell does not have the effect of conveying and, therefore, it does not operate as a transfer of property. The execution of an agreement of sale does not effect transfer of property from one person to another. Similarly, delivery of possession accompanied by an agreement of sale does not amount to transfer of an interest in the property.⁷ A transfer can be effected only by a registered sale deed, and not merely by an agreement to sell, general power of attorney or will.^{7a}

Division of Partnership assets among partners of a partnership firm is not a conveyance because all of them were already owners of such assets. A firm is not capable of owning property because it is not a legal person in the eye of law. Hence, registration of such apportionment is not necessary.^{7b}

(iv) *In Present or in Future*.—A transfer of property may be made so as to take place with immediate effect or to take place on a future date. The expression 'in present or in future' governs the word 'conveys'. It does not govern 'property'. The transferor can make arrangement that the property is vested or accrues to the transferee immediately after the completion of the transfer. He may also make such arrangements in which the vesting of the interest of the property is postponed to a future date. He is free to transfer a property also upon the fulfilment of certain conditions.^{7c}

4. Shah S.M., PRINCIPLES OF THE LAW OF TRANSFER, Ed. III, p. 7.

5. *Samaratni Devi v. Parasuram*, AIR 1975 Pat. 140.

6. A. Nadanar v. N. Mahalingam, AIR 1936 Mad. 918.

6a. *India Finance Securities Ltd. v. Indian Overseas Bank*, AIR 2013 AP 10.

7. *Agarwal v. Jhaji Baski*, AIR 2008 NOC 1135 Utr., the agreement was transfer of Bhumiadhari Rights.

7a. *Surya Lamp & Industries (P) Ltd. v. State of Haryana*, AIR 2012 SC 206.

7b. *Balbir Singh v. State of U.P.*, AIR 2012 All 113.

(a) A makes a gift of his property to B. He does not mention as to when B shall get the property and also does not lay down any condition. The transfer is present and B gets the property with immediate effect.

(b) A transfers his property to B for life and then to C. The transfer in favour of B is present (although he gets only life-interest) but the transfer in favour of C is future transfer.

(c) A makes gift of his watch to B provided B gets first division in the next examination. Here, although the gift has been declared today but it shall take effect only if B gets first division. Such transfers are called conditional transfers.

The conveyance may, therefore, be present, future or conditional.

A deed was executed by the husband and wife jointly providing that on the death of any one of them and if the schedule property still remained available, the surviving executant was to possess the property absolutely with right of alienation, on the death of the surviving executant the property was to go to their children. The Court held that the deed was a will and not a settlement executed or children.^{7c}

(v) *Property*.—The word 'property' has been used in a comprehensive sense. It has a very wide meaning and includes properties of all descriptions. It means moveable properties such as cars or tables. It means immovable properties such as lands or houses. It also means intangible properties such as right to catch fish or an actionable claims or other beneficial interests in a property.

Property is essentially a bundle of rights or interests. When a property is transferred, there may be transfer of all the rights in that property or only of some of it. All the rights in a property signifies ownership or absolute interest. Only some of the rights or interests in a property would mean partial or limited interest. In *Sunil Sidharthi v. Commissioner of Income-tax*^{7d} the Supreme Court rightly observed that in general, transfer of property means passing of a right in the property from one person to another. In one case there may be passing of entire bundle of rights (i.e. ownership) from transferor to transferee, but in another case there may be transfer of only some of such rights (i.e. partial interest). Thus, if A makes a gift of his house to B, there is transfer of absolute interest of the house. It is a transfer of 'property'. On the other hand, if A transfers the right of enjoyment of his house to B for a certain period it is called 'lease'. It is transfer of only partial interest in the house but it is also a transfer of 'property'.

The property must be a present property. That is to say, it exists on the date of the transfer. Transfer of any non-existent property is void. In *Jyotskashore v.*

7c. *Narayani v. Sreedharan*, AIR 2012 Ker 72.

8. AIR 1986 SC 368; *Shankar Yadav v. State of Jharkhand*, AIR 2012 Jhar. 21, once there was registered sale deed in favour of the transferee which was executed by the State, Munc Commission had no power to pass any order as to ownership and possession and lease of the property in the mine by the transferee.

*Ram Cotton Co. Ltd.*⁹ the Supreme Court held that the words in 'present or in future' qualify the word 'conveys' and not the word 'property'. When a future property is transferred, the transferee does not get that property or interest therein. Transfer of any non-existent or future property operates only as a contract which may be performed in future and can be enforced as soon as the property comes into existence.¹⁰

(vi) *To another living person.*—There must also be another person to whom the property may be transferred. Such other person is called transferee. Since, transfer of property as defined under Section 5 is an act between two living persons, the transferee must also be a living person.

The transferee need not be a competent person. Transferee may be minor, insane or even a child, *en ventre sa mère* (child in mother's womb). But, the transferee must be in existence when the transfer is being made. Property cannot be transferred to a person who is not in existence on the date of the transfer.¹¹

The transferee too may either be a human person or a juristic person. 'Another living person' includes also juridical person such as firms, societies, companies, corporations etc. and property may be transferred to them. An idol is a juristic person capable of holding property but it is not a 'living person' within the meaning of Section 5 of the Act.¹² It has been held that an idol is a symbol of deity and it is against the Hindu religion that a deity should accept any property or worldly goods.¹³ Dedication of property to a temple is not a transfer of property.¹⁴

It may be noted that the expression *inter vivos* refers to a conveyance or transfer of property from one living person to another living person. It is, therefore, an act which takes place between two living persons who are the parties to this transaction. In other words, only these two living persons would be the parties to a conveyance *inter-vivos*, not a person who is *stranger* to the conveyance or transfer. Accordingly, in an instrument if the word 'conveyance' of immovable property *inter vivos* is read in any context (e.g. under the Stamp Act) then it can only refer to such an instrument as transferring or conveying property between two living persons who are party to the instrument, and not a stranger to that instrument.¹⁵

To himself.—A transfer of property under Section 5 of the Act requires two 'living persons', the transferor and transferee. One cannot transfer a property to himself. But, one can transfer a property to himself in some other capacity. The words 'to himself' were added to this section by the Amending Act, 1929 to

include in the transfer of property also a case where a person makes any settlement of his property in a trust and appoints himself as the sole trustee.¹⁶ Here, the transferor and the transferee are physically the same person but as transferor he has the legal status of settlor whereas as transferee his legal status is that of a trustee.

Transfer of property as contemplated under this Act carries the same meaning throughout this enactment as it has been defined in Section 5. This definition has limited the scope of the term 'transfer of property'. Unless the above-mentioned essential elements are present in a transaction, it cannot be regarded as a transfer of property.

Certain transactions may now be examined so as to see whether they are transfer of property or not within the meaning of this Act.

Family settlement.—Family settlement or family arrangement is not a transfer of property. In a joint-family property all the members have their specific shares but they are not separated and are held jointly by all of them. When a family settlement takes place, the already existing specific shares of the members of the family are defined and separated in order to avoid any possible dispute. Thus, in a family settlement there is a mutual agreement between the members of a family to hold their respective shares separately. It simply acknowledges and defines the title of each member.¹⁷ In *Sadhu Madho Das v. Pandit Mukund Ram*,¹⁸ the Supreme Court observed that family arrangement is based on the assumption that there is an antecedent (pre-existing) title of some sort in the parties and the agreement acknowledges and defines what that title is.^{18a}

In *Randeo Foods Products Pvt. Ltd. v. Arvindbhai Rambhai Patel*,¹⁹ a memorandum of understanding was executed (executed) to resolve the dispute between the members of family. The Supreme Court held that such memorandum agreed between the family members can be treated as 'family settlement' and the Court cannot interfere with this. The Court will not 'casily disturb it'. Accordingly it was held as family settlement and not as a transfer of property.

It is not necessary that a family settlement should be restricted to the members of the family upto a particular degree. Such settlements can take place

16. *Narabhi v. Suleman*, (1975) 16 Guj. LR 289.

17. *T. K. Balakrishnan v. Devi Singh*, AIR 1966 SC 292.

18. AIR 1955 SC 481 : See also *K. Jagannathan v. A. M. Vasudevan Chettiar*, AIR 2001 Mad. 184 (Division of properties in specific shares of the parties under a deed of family arrangement, taxes of their respective shares in the property. The shareholders thereafter enjoyed their shares and paid binding on parties). *Gouranga Chandra Roy v. Gohinda Ballob Roy*, AIR 2014 Tri 26, gift deed did not use the word partition, but in essence it was a partition deed, it was also not conditional, registration not necessary because there is no transfer in partition, enforcement of deed allowed.

18a. *Vijay Singh v. Jitinder Singh*, AIR 2014 Del. 173, family settlement does not require registration. Allegation of coercion was found to be unfounded. Court less has to be paid according to the share of the separating party, not on the value of whole property.

19. AIR 2006 SC 3304 : *Arun K. Debbarma v. Alindia Kr. Debbarma*, AIR 2009 NOC 588 Gau. family settlement in the absence of any ambiguity should always be favoured and enforced.

9. AIR 1955 SC 376.

10. *Idid, Jyotir Sen v. State of W.B.*, AIR 2010 NOC 256 (Cal), a stamp vendor licence is not a property. It cannot be inherited.

11. However, property can be transferred for the benefit of an unborn person (person not in existence even in mother's womb) subject to provisions of Sections 13, 14, 15 and 16. Further, where property is transferred to a child in womb, the transfer is subject to its being born alive (Sec. 20).

12. See *Mulla : TRANSFER OF PROPERTY ACT*, Ed. VII, p. 51.

13. *Bhimji Nath v. Ram Lal*, (1910) 37 Cal. 128; *Ramalinga v. Sanchidram*, (1919) 42 Mad. 440 : 49 IC 742.

14. *Ropalraj Nath v. Ramchandran*, AIR 1926 Nag. 469.

15. *State of Rajasthan v. Bhikaram Spinners Ltd.*, AIR 2001 Raj. 184.

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not only among heirs of a particular class, they can include persons outside the purview of succession.²⁰

In a family settlement since there is no creation of any new title or interest in favour of any member, there is no conveyance; therefore, it is not a transfer of property. The suit was for possession on the basis of a family settlement. The defendants admitted that the property was of ancestral nature. Minor members were not parties to the settlement, nor there was anything to show how their interests were safeguarded. The settlement deed was also not registered. One of the lady members stated that her signature was obtained fraudulently on a blank paper by the defendants. The Court said that the deed was not valid as it was neither read out to the plaintiff nor understood by her before signing.^{20a}

Compromise.—Compromise is also not a transfer of property. Compromise means agreement for the settlement of doubtful claims between the parties in respect of some property. Like family settlement, here too the titles or interests of the parties are antecedent or already existing; the compromise deed simply defines them.²¹ Since there is no conveyance, a compromise deed is not a deed of transfer.

Partition.—Partition is not a transfer of property. Partition means separating the parts of co-owned property. If in a property there are several co-owners having under the law, their respective interests but the whole property is neither used nor enjoyed by them separately then, after the partition each member gets merely the separate right of enjoyment. Accordingly, it has been held that partition is really a process by which a joint enjoyment is transformed into an enjoyment severally, and no conveyance is involved in the process as the conferment of a new title is not necessary.²² It simply effects a change in the mode of enjoyment of property but it is not an act of conveying property from one living person to another.²³ In *Mohar Singh v. Devi Channi*,²⁴ the Supreme Court explained the legal nature of a partition in the following words:

"Partition is not actually a transfer of property, but would only signify the surrender of a partition of a joint right, in exchange for a similar right from the other co-sharer or co-shares."

For the purpose of determining whether the document is a partition deed, it is the contents of the document that are to be taken into consideration and not nomenclature alone. There was no recital in the whole agreement to the effect that it was recording the agreement of an earlier partition which had already taken place. The agreement in question purported to create, declare, assign,

20. *Zahida Begum v. Lal Ahmed Khan*, AIR 2010 AP 1.

20a. *Sunitha Devi v. Pradeep Kumar*, AIR 2015 NOC 104 (P&H), the defendant was not entitled to possession on the basis of such a deed.

21. *Abhis Banaji Bhat v. Muhammad Raza*, AIR 1929 Oudh 193; *Kilunni Lal v. Govind Krishna*, (1911) 33 All. 356.

22. *Chunakerrai v. Lakshmi Choud*, AIR 1988 Delhi 13.

23. *Indrajit Jethoji v. Kallipalli*, (1913) 54 IC 146.

24. *Ashok*, AIR 2011 SC 1340, a family settlement is not a transfer of property. Finding of fact arrived at by the first appellate Court was that the settlement was of *bonafide* nature for avoiding family disputes. That was the last court of facts. Interference in such finding by the High Court in second appeal was held to be not proper.

limit and extinguish right and interest over immovable properties. It was held that the document required to be duly stamped and properly registered.²⁵

A father partitioned his property among his three sons. The agricultural land was given to one of them, the plaintiff in the case. The pucca house was given to the two others. They were already in possession of the property respectively as distributed under the partition and had been making improvement in their respective shares. Thus they had been acting on the family settlement. They became bound by it. The Court said that it was immaterial that the mutation of the agricultural land was in the name of all the three sons.²⁶

Once a partition is effected, whether by way of family arrangement or deed of partition, there is severance of jointness of properties. Two brothers thereafter exchanged properties held separately by them. It was held that such mutual transfer of separate properties, if more than one hundred rupees in value, could be made only by a registered agreement.^{26a}

Surrender.—A surrender is also not a transfer of property within the meaning of Section 5 of the Act. Technically, surrender means merging of a lesser (or smaller) interest with a greater interest in such a manner that the greater interest is not enlarged. Surrender is therefore falling of a lesser estate into a greater. For example, A is landlord and B is his tenant. A as landlord has ownership of the house. Ownership or absolute interest is a larger interest. B as a tenant has also an interest in A's house but A's interest is lesser interest because it is limited only to right of enjoyment. Now, if A vacates the house before expiry of the term of tenancy, it would amount surrendering of his right of residence. Here, the lesser for smaller interest, namely the right of residence, which was away from the absolute interest of the landlord during tenancy, comes back to ownership (larger interest). There is no creation of any new title or interest in favour of the landlord. Thus surrender by a tenant to the landlord²⁷ or by a widow to the reversioners²⁸ has not been regarded as a transfer of property.

Release.—Release is a transfer of property. If a larger interest falls into a smaller interest in such a way that smaller interest is enlarged then, for the holder of smaller interest there is creation of a new title or interest. Since some new titles or interest are added to his already existing interest, there is conveyance hence it amounts to transfer of property.²⁹ According to Mulla,³⁰ where a person in whose favour the "release" is executed gets rights by virtue of the release, the deed amounts to "transfer". In *Muniappa Pillai v. Periasami*,³¹ after taking some money A executed a deed transferring his right, title and interest in his half share of the property absolutely in favour of B. The document thus gave B absolute rights in the share which belonged to A and to which B was not entitled. The Madras High Court held that this document

25. *Vincent Lourdelmathan v. Josephine Syla Domingue*, AIR 2008 NOC 1173 Mad.

26. *Gurcharan Ram v. Tejwant Singh*, AIR 2008 NOC 1650 (P & H).

26a. *Balkrishna Bhagwanji Lohi v. Pankaj Shrinan Lohi*, AIR 2015 NOC 89 (Bom).

27. *Morni v. Krishna*, (1925) Nag. 455; See also *Somanthi Devi v. Pannasuram*, AIR 1975 Pat. 140.

28. *Kaloti v. Jassuram*, (1926) Oudh 69 : 89 IC 722.

29. *Official Assignee, Madras v. Telimani, Divisani Telimani*, AIR 1972 Mad. 187.

30. TRANSFER OF PROPERTY ACT, Ed. V, p. 51.

31. (1975) 1 MJ 236.

clearly came under the definition of deed of "transfer" within the meaning of Section 5.

Since coparcenary property is a joint-property of all the coparceners therefore, a release in favour of only one or some coparcener would be deemed to be a transfer in favour of all the coparceners. In *M. Krishna Rao v. M. L. Narsimha Rao*,³² a release deed was executed in favour of some out of several coparceners. The Andhra Pradesh High Court held that release made in favour of some coparceners would operate to the benefit of all the other coparceners and not only in favour of those coparceners in whose favour release was executed.

Release may be with consideration or without any consideration.

Relinquishment.—Relinquishment means giving up one's rights or interests. Its effect is extinction of one's rights in a property; there is no intention that the person relinquishing his interest is conveying that interest in favour of another person. Relinquishment is therefore, not a transfer of property. Moreover, since relinquishment connotes the extinction of a right therefore, there is nothing left to transfer so that it may amount to a transfer of property as defined in Section 5 of the Act.³³

Charge.—Charge is not a transfer of property. Charge is created on a property for securing a payment out of that property. When the property of a person is charged for securing certain payments e.g. maintenance, it is simply transfer because the only right created under it is a right to payment out of the property subjected to the charge.³⁴

Property situated outside India.—The definition of transfer of property given in Section 5 is applicable also to properties situated outside India or the territories to which the Act is not applicable.³⁵ It may be noted that because of its very nature, transfer of immovable property is governed by the law of the land where the property is situated. But, this does not mean that a person cannot claim rights under the transfer of that property under this Act. However, his claim is subject to contrary claims or rights of the affected party under the law of the land where property is situated. But it is for the affected party to prove that the transfer is defective or invalid under the law of the land where the property is situate.³⁶

6 What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

³² AIR 2003 AP 498.

³³ *President Investment Co. v. Commr. Income-tax*, AIR 1954 Bom. 95. See also *Kuppuswamy Chettiar v. Arumugam*, AIR 1957 SC 1395.

³⁴ *Gohari v. Dwaranath*, (1908) 35 Cal 837.

³⁵ *Prithi Singh v. Gansh*, AIR 1951 All 462.

³⁶ *Central Bank of India v. Nasseranji*, AIR 1932 Bom. 642.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owners personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A mere right to sue cannot be transferred.

(f) A public office cannot be transferred, nor the salary of a public office, whether before or after it has become payable.

(g) Stipends allowed to military, naval, air-force and civil pensioners of the Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee.

(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

SYNOPSIS

• Transferability of property is general rule, its non-transferability is exception.

• Non-transferable under any other Law.

• Non-transferable under Section 6.

• Spes-successions:

• chance of an heir-apparent.

• chance of getting property under will.

• any other possibility of like nature.

• Spes-successions under Muslim Law.

• Spes-successions in Punjab.

• English Law.

• Clause (b) : Mere Right of Re-entry.

• Clause (c) : Easement apart from Dominant Heritage.

• Clause (d) Restricted Interest.

- Clause (dd) : Right to Future Maintenance.
- Clause (e) : Mere Right to Sue.
- Clause (f) : Public Office & Salary of Public Officer.
- Clause (g) : Pensions and Stipends.
- Clause (h) : Transfer Opposed to Nature of Interest etc.
- Transfer opposed to Nature of Interest etc.
- Transfer where its object or consideration is unlawful.
- Transfer made to a disqualified transferee.
- Clause (i) : Untransferable Right of Occupancy.

TRANSFERABILITY OF PROPERTY

For a valid transfer of property, the property must be a transferable property. As a general rule, property of every kind may be transferred. But there are certain kinds of properties the transfer of which is not allowed under the law. Such properties are called non-transferable properties. Transfer of any non-transferable property is void. It may be stated, therefore, that *transferability of property is the general rule, its non-transferability is an exception*. Exceptions to the general rule that property of every kind may be transferred are given in Section 6 of the Transfer of Property Act. According to Section 6, property of any kind may be transferred except:

- (a) properties which cannot be transferred by any law, for the time being, in force in India, and
- (b) the properties which cannot be transferred otherwise as given in this Act.

Under Section 6 of the Act, non-transferable properties have been divided into two categories. First, those properties which cannot be transferred under any law (other than the Transfer of Property Act) enforced in India. Secondly, the properties which have been mentioned specifically under clauses (a) to (i) of Section 6 of the Transfer of Property Act. In other words, non-transferable properties are not only those properties which have been stated specifically under Section 6, Under Section 6 are included also those properties which are made non-transferable under other laws enforced in India.

Non-transferable under any other Law

Besides the Transfer of Property Act, there are other laws e.g. Hindu law, Muslim law, the Civil Procedure Code etc. which are enforced in India. If under any such law there are certain properties the transfer of which is prohibited by that law, those properties are non-transferable also under Section 6. Section 6 recognises the non-transferability of any property also under other laws in force in India. For example, under Hindu law coparcenary property is regarded as non-transferable and there is restriction on the transfer of such property. Similarly, a property dedicated to God, being of religious use, is also non-transferable under Hindu law. The right to receive offerings as a co-sharer is dependent upon the right of performance of *pooja*. Such a right is not transferable. The sale deed was void. But the Court said that even if the plaintiff got no right under the sale deed, he would be entitled to share the offerings by inheritance.^{36a} Under Muslim law, *Waqf*—properties and the

36a. *Dani Ram v. Jannum Das*, AIR 2010 NOC 524 (All).

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S. 61 office of *Mutnalli* etc. have been regarded as properties which cannot be transferred. Section 60 of the Civil Procedure Code, prohibits the attachment of necessary cooking-vessels and the tools of artisans etc.³⁷ Moreover, transfer of agricultural tenancies have been prohibited under certain local enactments and local customs.³⁸

Non-transferable under Section 6

Section 6 lays down ten kinds of specific properties or interests which cannot be transferred. These non-transferable properties are given in the following clauses:

(1) **Clause (a) : Spes-Successionis.**—*Spes-Successionis* means expectation of succession. Expectation of succession is expecting or having a chance of getting a property through succession (inheritance or will). *Spes-Successionis* is, therefore, not any present property. It is merely a possibility of getting certain property in future. *Spes-Successionis* under this clause includes:—

- (1) chance of an heir-apparent succeeding to an estate,
- (2) chance of a relation obtaining a legacy on the death of a kinsman or,
- (3) any other mere possibility of a like nature.

Chance of an heir-apparent.—Heir-apparent is apparently an heir but not legal heir. Heir-apparent is a person who would be heir in future if he survives the propostus (the deceased whose property he inherits) and if the propostus dies intestate (without making any will). Father and son are entitled to inherit the property of each other. If father dies first, the son becomes father's heir and inherits the properties of his father. But if son dies first i.e. while the father is still alive, he cannot inherit father's property. Who would die first, i.e. who survives whom, is not known because it is uncertain future event. Accordingly, during the life of father, the son cannot be called as his heir; he is simply heir-apparent of his father. An heir-apparent has only a chance of inheriting the property subject to two possibilities (1) he survives the propostus and (2) the propostus dies intestate i.e. without making any will. It is possible that though the son survives his father but he finds that his father had made a will under which the property is to be given to another person after his death and not to his heirs. Thus, before the intestate death of the propostus, the 'chance' of an heir-apparent of getting the property is merely a future possible interest. It is a bare or naked right which does not create any interest in favour of the heir-apparent. Law cannot treat it as a present fixed right in the property. Therefore, chance of an heir-apparent is a non-transferable property.

Illustrations

- (i) A has two sons B and C. A has become very old and is also suffering from an incurable disease. But he is still alive. Expecting that A must

37. *Palkandy v. Krishnan*, (1917) 40 Mad. 302 : It may be noted that Section 60 of the Civil Procedure Code is analogous to Section 6 of the Transfer of Property Act and prohibits the attachment of certain properties given in that section.

38. *Kansingh Kulasing Thakore v. Ratnari Mangunbhai Vashantbhai*, (2006) 12 SCC 360, transfer of property can be prohibited only by the provision of some law and not by direction or judgment made in a writ petition under Article 226. *Kamkeli v. State of U.P.*, AIR 2009 NOC 190 (All), lease land which was Bhumidhari with non-transferable rights. No interest can be transferred in such land to another person. The land would stand vacated and vest in the State.

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die very soon and he is in need of money, B sold his half share in A's property to X. This transfer is void because before A's death B is not a legal heir, he is simply an heir-apparent. B would be A's heir and entitled to half-share in A's property only after A's death and that too if A dies intestate, i.e. without making any will.

(ii) A has a wife W and a daughter D. During the life of A, D released her share in A's property in consideration of Rs. 1000 which was paid to her by her father A. A dies and D claims her 1/3 share under Muslim law of inheritance.

W (her mother) resists her claim on the ground that since D had already transferred her share by a release-deed on consideration of Rs. 1000, she is not entitled to get 1/3 share. *Held*: the release is no defence because it is a transfer of *Spes-successionis*. Before A's death D was merely an heir-apparent and had no right in her 1/3 share. The release-deed was held void. D was entitled to inherit despite the release-deed executed by her. However she is bound to bring into account Rs. 1000 which she received from her father.³⁹

However, where a person is not heard of for a long period and is believed to have been dead, the transfer of his properties by his brother as his legal heir would be a valid transfer because, under the circumstances, brother is not merely an heir-apparent but a legal heir.⁴⁰

Rights of reversioners under old Hindu Law.—Under old Hindu law, the rights of a reversioner i.e. 'reversionary right' was merely a chance of getting properties and as such it was *Spes-successionis*. Reversioner was a person who used to inherit the properties of a widow held by her for life. Such persons were called reversioners because during the life of the widow, their rights of inheritance were suspended but it reverted to them after widow's death provided they survived her. Thus, during widow's life the Hindu reversioner had no right or interest *in praesenti* in the property which the female owner held for her life and until it vested in him on her death provided he survived her, he had nothing to assign or transfer.⁴¹ Being a *Spes-successionis* the agreement to transfer the properties by a reversioner was not valid. In *Aniruddha v. Gour Mohan*⁴² the Privy Council held that since the interest of a Hindu reversioner is a *Spes-successionis*, an agreement to transfer, or a transfer of, such an interest does not become effective; the agreement is void.

Chance of a legacy.—Chance of a legacy means expectancy of getting certain property under a will. The well settled law of wills is that a will operates only after the death of the testator (who makes the will) not on the date when it is written. Further, it is the last will which prevails and if two or more wills have been executed in favour of different persons, only the legatee under the last will is entitled to get the property. Accordingly, where a person executes any will, before the death of that testator, the legatee has simply a chance of getting property because (1) the legatee may not survive the testator and (2) the will in his favour might not be the last will. Before a will operates

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i.e. before the death of the testator, the legatee has merely a hope of getting properties in future provided it is the last will.

Accordingly, the chance of a relation or a friend or any person receiving a legacy is a possibility even more remote than the chance of succession of an heir and is, therefore, not transferable.⁴³

Any other possibility of a like nature.—Any other possibility of the like nature would mean any other possible interest or property which is as uncertain as the chances of an heir-apparent or chance of a relation of getting property under a will. The central idea behind clause (a) is that any property which is merely a future uncertain possible interest should not be made a transferable property. Therefore, clause (a) exclude not only the chance of an heir-apparent or of a legatee but also any other 'chance' of getting future property which is not at present a fixed right of the transferor. The possibility of getting a property in future as contemplated here is like the possibility of getting a prize in a competition or winning a lottery. Other possibilities of a like nature therefore must be interpreted to mean possibilities belonging to the same category as the chance of an heir-apparent or the chance of a relation obtaining legacy.⁴⁴ Thus, future wages of a servant before they are actually earned by him, are mere possible interest and as such cannot be sold, attached or otherwise transferred.⁴⁵ Where a fisherman contracts to transfer the fish which he would get in his next catch before throwing his net, the transfer would be a transfer of mere possible interest of the same kind as that of a chance of an heir-apparent receiving property in future. The fisherman may or may not get any fish at all in his next catch. There is no certainty that any fish will be caught and the fisherman has no interest in the fish until they are caught.⁴⁶ Customary right to scavenge i.e. right to collect things from the rubbish has been held non-transferable right.⁴⁷ Similarly, chance of being paid gratuity is also held to be not transferable.⁴⁸

Right to receive future offerings.—Right to receive offerings of a temple or shrine is a proprietary right or beneficial interest. It is, therefore, property. Offerings which have actually been made in the temple are present property. Thus, share of a priest in the net-balance of the offerings already made to an idol may be attached.⁴⁹ But as regards the transferability of the right to receive future offerings, the opinion of the Courts is divided. According to Calcutta High Court⁵⁰ the right to receive future offerings is uncertain future right (interest) because it is merely a chance that a worshipper offers something at temple; he may or may not make any offerings at all. Hence it is a 'mere possibility' which cannot be transferred. On the other hand, according to

39. *Samsuddin v. Abdul Hussain*, (1906) 31 Bom. 165.

40. *Samir Kumar v. Nirmal Chandra*, (1975) 79 CWN 934.

41. *Amril Nanyan v. Goya Singh*, (1918) 45 Cal. 590 : 45 IA 35.

42. AIR 1921 Cal. 501 : AIR 1923 PC 189.

43. See *Mulla*; TRANSFER OF PROPERTY ACT, ED. VII, p. 59.

44. *Prashant v. Venkata Subrahmanyam*, (1918) 47. LC. 363.

45. *Devi Prasad v. Lewis*, (1909) 31 All. 304 : 1 LC. 186.

46. *Mulla*; TRANSFER OF PROPERTY ACT, ED. VII, p. 59.

47. *Rudra v. Keerappa*, AIR 1951 MB. 120.

48. *Solomon v. Official Assignee*, AIR 1939 Rang. 5.

49. *Dyumbhar v. Haril*, AIR 1927 Bom. 143.

50. *Purnima Thakur v. Bindaswan*, (1916) 43 Cal. 28 : *Nitya Gopal v. Nani Lal*, (1920) 47 Cal. 990.

Allahabad High Court⁵¹ the right to receive future offerings is 'not so uncertain, variable and limited as to pass out of the conception of the law'. It is, therefore, transferable.

The Supreme Court has now settled the law. In *Badrinath v. Purna*,⁵² following the view of Allahabad High Court, the Supreme Court held that the right to receive the offerings being coupled with duties other than those involving personal qualifications, therefore, transferable and could be inherited. The Apex Court observed that it did not depend on any possibility of the nature referred to in Section 6(a) of the T.P. Act. In this case the right to receive the future offerings at the sacred temple of *Shri Vaisno Devi Ji* was held to be heritable right (interest).

The 'possibilities' as referred to in this clause are in the nature of uncertain future interest subject to several possibilities. Law cannot take the risk of recognising any interests subject to several possibilities. It may be noted that *contingent interest* as provided in Section 21 of this Act is also a possible interest depending on uncertain future event. But contingent interests are transferable interests because here the possibilities are coupled with some interest; they are not bare possibilities.⁵³

Spes-successionis under Muslim Law.—Spes-successionis is not transferable also under Muslim law.

But virtue of Section 2 of this Act, the provisions of Chapter II including Section 6(a) do not apply to Muslims.⁵⁴ So, if the rule of Muslim law would have permitted the transfer of *Spes-successionis*, it would have been transferable interest. But, the transfer of *Spes-successionis* is equally void under Muslim law.⁵⁵ In *Abdul Gaffar v. Abdul Razack*,⁵⁶ the Madras High Court held that since in the case of Muslims too the transfer of an expectancy by a heir presumptive (heir-apparent) is void *ab initio*, therefore, no question of an estoppel can arise by reason of the heir renouncing her claim before the expectancy opens.

Where, however, a sum of money was received by the legal heir apparent in lieu of her share in the property of her father during his lifetime, it was held that she was estopped from claiming her share in the property of her father on his dying intestate. The Court said that estoppel as a rule of evidence can be applied to estop an heir apparent from succeeding to the estate on account of his conduct.^{56a}

The Supreme Court has also endorsed this line of decisions. The heir apparent received advantage for giving up his future right to property. It was

51. *Balwantund v. Tula Ram*, A.I.R. 1928 All. 21; *Ahmaduddin v. Iqbal Baksh*, (1912) 34 All. 465; 14 I.C. 587.

52. A.I.R. 1979 S.C. 1314.

53. *Phulwanji Kuntwar v. Janashor Das*, (1924) 46 All. 575: For difference between *spes-successionis* and contingent interest see comments on Section 21 in the following pages.

54. Section 2(c): "—and nothing in the second chapter of this Act shall be deemed to affect any rule of Mohammedan law."

55. *Samsuddin v. Abdul Husain*, (1906) 31 Bom. 165; *Asa Betei v. Karuppan* (1918) 41 Mad. 365.

56. A.I.R. 1959 Mad. 131.

56a. *Hameed v. Jameela*, A.I.R. 2010 Ker. 44.

held that he could not be allowed to claim the benefit of the doctrine of *spes successionis* as embodied in Section 6. He was to be estopped from claiming share in the inheritance.^{56b}

Spes-successionis in Punjab.—The Transfer of Property Act is not applicable in Punjab, therefore, *Spes-successionis* is not any non-transferable property. The transfer of *Spes-successionis*, i.e., transfer of expectancy or of reversionary right, has been held valid in Punjab⁵⁷ in the absence of applicability of the Transfer of Property Act in Punjab, the Courts there follow the English equitable principles. It is submitted that although the Act does not extend to Punjab, the Courts may apply the law laid down in Section 6(a) of this Act on the ground of their own equity, justice and good conscience instead of following English equity. This would bring the law in Punjab in tune with the law applicable in other parts of India.

English Law.—Under English law too, *Spes-successionis* is non-transferable property. But if the transfer of *Spes-successionis* is supported by some consideration, the transfer is not void *ab initio* under the English equity. In other words, transfer of expectancy for value has been protected by equity. The result is that if an heir-apparent transfers the property and the transfer is for valuable consideration then, when that heir-apparent becomes legal heir and gets interest in that property, the equity shall compel him to pass on the title to the transferee. The English equity would not allow the transferor (heir-apparent) to plead that the transfer was void *ab initio*. However, where the transfer of *Spes-successionis* is without any consideration, i.e., there is a gift of expectancy, the transfer would be void because equity then cannot protect the interest of the transferee.

It may be noted that the above-mentioned equitable principle has been incorporated in Section 43 of the Transfer of Property Act and the Supreme Court has adopted the same view.⁵⁸

(2) Clause (b) : Mere Right of Re-entry.—Section 6(b) provides that mere right of re-entry cannot be transferred. 'Right of re-entry' means right to resume possession. Where a person gives the possession of his property to another for a certain period and is afterwards entitled to get it back, his right of entering into the possession of that property once again, is technically called as his right of re-entry. Under this clause, the right of re-entry refers to the right of a lessor or landlord to resume possession of the property from the lessee (tenant) upon the breach of a condition subsequent. The right referred to in this clause is similar to the right of a lessor under Section 111(g) of this Act where a lessor is entitled to terminate the lease if lessee commits breach of any condition imposed by him (lessor). For example, a landlord lets out his house and imposes a condition that the tenant must not make any alteration in the house. Upon the breach of this condition by the tenant, the landlord has right to terminate the tenancy whereby he would resume the possession before expiry of the term of tenancy. This right of the landlord is his right of re-entry.

56b. *Shetnamal v. Hasan Khani Rasthwar*, AIR 2011 SC 3609; (2011) 9 SCC 223.

57. *Goutind v. Chaman Singh*, A.I.R. 1933 Lahore 378; *Koriri v. Mt. Rahimn*, A.I.R. 1933 Lahore 555.

58. See *Bharati Nidhi Ltd. v. Takhtmal*, A.I.R. 1969 S.C. 313.

The right of re-entry is, therefore, a right connected or accompanied with interest in a land. Mere right of re-entry means a right to resume possession not accompanied with any other interest in land. The right of re-entry apart from or without any interest in land is simply a personal licence. Section 6(a) prohibits the 'mere' right of re-entry because personal licence cannot be transferred under the law. But right of re-entry coupled with any other interest in the land is transferable together with that interest. Thus, where the land itself is transferred or the lessee has been given as a permanent lease, the right of re-entry is automatically transferred to the transferee of land or the lessee, as the case may be. The right of re-entry is an estate of reversioner i.e., the lessor's interest in the land leased to the lessee. When that interest itself is transferred to the lessee, the right of re-entry would pass on to him together with such interest.

Illustrations

- (i) A has leased his land to B for a period of three years with an express condition that B shall not dig any well on the said land. B digs a well on the land. A asks C to take possession of the said land from B i.e. A transfers his right of re-entry upon the breach of condition by B. C cannot take possession from B because A has transferred to him mere right of re-entry.
- (ii) A lets out his house to B for five years subject to a condition that B shall not sub-let it to any other person. B sub-lets the house in violation of the express prohibition. A has right to terminate the tenancy, i.e. has right of re-entry. But during tenancy (before expiry of the term of five years) A sells the house to C. C has a right to terminate the tenancy of B because A transfers to C not only right of re-entry but also other interest, namely, ownership to C.
- (iii) Certain goods are delivered under hire-purchase agreement giving the bailor (seller) a right to re-enter the godown where goods are kept and take possession in default of payment of any instalment. The bailor assigned (transferred) his rights under the agreement by way of security to his creditor. The assignment is invalid. Creditor cannot enforce the right of re-entry because it is merely a personal licence unaccompanied with any interest in the goods.⁵⁹

(3) **Clause (c) : Easement apart from Dominant Heritage.**—Easement is a right which exists for the beneficial enjoyment of a land and is exercised upon the land of another person. The land or tenement (house) for whose beneficial enjoyment this right exists is called dominant heritage and the land or tenement upon which the right is exercised is called servient heritage. For example, A who is owner of a house has a right of way upon the land owned by B so that he may reach the main road. A's house is dominant heritage and the land of B is servient heritage. A's right of way is easementary right. Although this right is exercised by A but it exists for beneficial enjoyment of A's house; therefore, technically, the right is not of A i.e. it is not his personal right but a

right attached to the house. Since this right is part and parcel of this house i.e. the dominant heritage, it cannot be severed or detached from it. In other words, an easement cannot exist independently of the dominant heritage. Accordingly, although it is a proprietary right and as such a property yet, its separate transfer is prohibited.

Clause (c) provides that an easement cannot be transferred apart from the dominant heritage. But, when the dominant heritage itself is transferred, the easementary right appurtenant (attached) to it is by itself transferred together with the dominant heritage.

It may be noted that Clause (c) of the Act prohibits the transfer of easement; it is not concerned with the creation of easement which is not any transfer.⁶⁰ Similarly, this clause is also inapplicable where the owner of the dominant heritage releases the easement in favour of the servient heritage. Release of an easement is not transfer; it is extinction of the right.

(4) **Clause (d) : Restricted Interest.**—Under this clause an interest in property restricted in its enjoyment to the owner personally has been made non-transferable. Beneficial interests or an interest by virtue of which a person derives certain benefit is the property of that person. Such property (beneficial interest) is owned by that person but he cannot transfer it. It is restricted to his own enjoyment. As a matter of fact, such interests are created in favour of a person only due to his (her) personal qualifications. Such interests are, therefore, purely personal in nature and may be called personal rights which are non-transferable. It would be against the very nature of the right and would also defeat the purpose of its creation if such rights are made transferable. For example, a teacher's right to teach is his beneficial interest but this right is given to him only due to his personal qualifications. Although it is his beneficial interest, he cannot transfer it because only he, on the basis of his qualifications, has been given this right by the institution. He can transfer his watch but he cannot transfer his beneficial interest of teaching. The reason behind making personal interests as restricted interest (and thereby making it non-transferable) is that the transferee may not have that personal qualification which the holder of such interest has. Such interests are, therefore, *res extra commercium* (things beyond any trade or transaction).

Section 6(d) deals with 'restricted interest' itself, not with ownership (absolute interest) with certain restrictions on right of enjoyment or possession. In *K. Balakrishnan v. K. Kamalam*,⁶¹ a lady inherited some property from her maternal-father as owner. She gifted this property to her minor child reserving personally the possession and the right of enjoyment to herself. It was argued that since the gift (to the minor) was of 'restricted interest' which was prohibited under Section 6(d), therefore, the gift-deed was void. But, the Supreme Court held that it could not be said that the gift-deed was effectual merely because the donor restricted to herself the possession and

60. *Sital Chandary v. Delaney*, (1916) 20 Cal. W.N. 1158; 34 I.C. 450.

61. A.I.R. 2004 S.C. 1257; *Sri Siddanuja v. Sri Gangadhar*, A.I.R. 2012 Kär. 143, entire land transferred, a portion retained by the settlor as life interest, a limited estate. Its transfer was not lawful, possession, if given, was recoverable.

employment of the property gifted. Explaining further the Supreme Court observed, "Clause (d) of Section 6 which provides that all interests in property restricted in its enjoyment to the owner personally cannot be transferred by him is not attracted on the terms of the gift-deed herein because it was not a property, the enjoyment of which was restricted to the owner personally. She was absolute owner of the property gifted and it was not restricted in its enjoyment to herself."

Religious offices, such as the office of *Shahit* or *Pujari* who performs religious services in a temple⁶², or, *Mahant* of a *Muti* ⁶³ or *Mutawali* of a *Wahy*⁶⁴ are all restricted interests because these offices are held by the persons concerned only on the ground of their personal qualifications. *Brili Mahabrahmini* i.e. right of a mahabrahmini to officiate the funeral ceremonies has been held to be a restricted interest.⁶⁵ The emoluments or the right to get money or some property only by virtue of holding a religious office is also non-transferable.⁶⁶ But, where the emoluments are independent of religious office, such emoluments can be assigned to other person.⁶⁷

Right to receive certain payments or something only because of some peculiar status is also restricted interest. Thus, *Kharcha-i-pandam* (personal allowances granted by husband to a Muslim wife) even if a charge has been created for its payment, is wife's personal right and cannot be assigned.⁶⁸

Similarly, under Muslim law, the widow's right of retention of her husband's properties in lieu of unpaid dower, has been held a restricted interest.⁶⁹

Service tenures i.e. right in certain land which are given to a person by way of remuneration for personal services being discharged by that person, are also non-transferable. Such tenures depend on personal services of the holder of the lands. *Watan* lands in Bombay, *Karnam* tenures in Madras, *Chattral* in Bengal or the *ham* lands in general have been held service tenure and therefore, they are non-transferable.⁷⁰

Interests may be restricted also in cases where the property is given to a person for use for some specific purpose. Since the idea behind creating such interest is the 'specific purpose', it cannot be transferred to any other person for any other purpose. For example, A gives the possession of his house to B for a week so that B may perform the marriage ceremony of his daughter. B transfers the possession of the house for the said week to C and performs the marriage of his daughter in a hotel. The transfer of possession of the house by B to C is

62. *Ngendra v. Bahindra*, A.I.R. 1926 Cal. 490.

63. *Pingay Das v. Mahant Kripparam*, (1908) C.L.J. 499.

64. *Wahid Ali v. Ashraf*, (1881) 8 Cal. 732.

65. *Durga Prasad v. Shambhu*, (1919) 41 A.L.J. 656.

66. *Mahamaya v. Haridas*, (1915) 42 Cal. 455, 27 L.C. 400.

67. *Balmukund v. Tularam*, 50 All. 394.

68. *Alij Begum v. Brji Narain*, (1929) All. 281.

69. *Zohar Ahamed v. Jai Nandan*, AIR 1960 Pat. 147 : However according to the Mysore and Allahabad High Courts, this right is transferable. But the Patna High Court view it is

submitted, is correct.

70. *Jag Jiwandas v. Jaisal Ali*, (1882) 6 Bom. 211; *Popaya v. Ramana*, (1884) 7 Mad. 85; *Uday Kumari v. Hari Ram*, (1901) 28 Cal. 483; *Anjagulu v. Sri Venugopal*, AIR 1922 Mad. 197.

invalid because B's interest in the house of A was an interest given to him only for some specific purpose. It is A's restricted interest, therefore, non-transferable.

(b) **Clause (dd) : Right to Future Maintenance.**—Where a person is entitled to receive maintenance allowance, it is his personal right because it is given or is promised to be given in future solely for his own benefit. As such, the right to future maintenance is a restricted interest which is non-transferable under Section 6(d) discussed earlier.

Maintenance may be granted to a person either by personal contract or under a decree of the Court of law. Where maintenance is granted by the decree of Court, it is more certain and secured than the maintenance granted by a personal contract. Before, 1929, there was judicial controversy regarding the transferability of the maintenance granted by decree of the court. According to Calcutta High Court,⁷¹ the maintenance granted by court was not transferable because essentially right to maintenance was a personal right whether granted by court or by personal contract. But according to Madras High Court,⁷² right to future maintenance, when granted under a decree of Court was a secured right and was transferable. The Amending Act, 1929 has inserted clause (dd) to resolve this judicial conflict. Under clause (dd) the right to future maintenance is now non-transferable right even if it has been granted under any decree of the Court of law.

It may be noted that under this clause there is prohibition on the transfer of future maintenance granted under a decree. The assignment of the decree for maintenance which has already accrued due shall be a valid assignment⁷³ because arrears become debt and as such, can be attached or sold.

(c) **Clause (e) : Mere Right to Sue.**—Right to sue for a certain sum of money is actionable claim. Actionable claim is a claim for a certain amount of money and can be transferred. But right to sue for uncertain or indefinite sum of money is not transferable. Under Section 6 (e) 'right to sue' means right to sue for the claim of any uncertain sum of money. Claim for an uncertain sum of money arises where the claim is for unliquidated damages either in tort or in contract or where the claim is for any amount which is not fixed. Thus, where a person is entitled to claim damages because some tort has been committed against him, he has a right to claim damages by way of compensation. This right to claim damages from the wrong-doer is not a claim for any certain or fixed sum of money and shall come within the meaning of 'right to sue' as given in this clause.^{73a}

Illustrations

- (1) A publishes defamatory statements against B. Under the law of tort B has a right to claim damages from A. B thinks that he must sue A claiming Rs. 50,000/- as damages. But, instead of filing the suit

71. *Asad Ali v. Haidar Ali*, (1910) 38 Cal. 13.

72. *Ramee Annampuri v. Sumanthilla*, (1911) 3 Mad. 7.

73. See *Mulla* : TRANSFER OF PROPERTY ACT, Ed. VII, p. 65.

73a. *Sunder v. Ramdass*, AIR 2013 Mad 133, an advocate assigned his right to the petitioner to sue the defendant for damages for defamation. Such right is not assignable. Pauper petition not maintainable.

himself *B* assigns this right to *C*. *C* sues *A* claiming Rs. 50,000/- from him for the defamation of *B*. The assignment (transfer) of right to sue for damages by *B* to *C* is invalid because it is non-transferable right under Section 6(e). *C* has, therefore, no right to claim damages from *A* and his suit is not maintainable.

(ii) There is a contract between *A* and *B* under which *A* agrees to transport certain goods of *B* from Calcutta to Bombay within a month. *A* fails to transport the said goods within the stipulated time and thereby commits a breach of contract. Due to delay caused in transportation of goods by *A*, *B* has to incur loss in the market. *B* is entitled to claim damages from *A*. *B* assigns this right to *C*. The assignment being transfer of 'mere right to sue' for damages, is invalid and *C* cannot recover damages from *A*.

In the above-mentioned illustrations the assignment of the claim of damages is invalid because of two reasons. First, the right to sue is for claiming damages which are an uncertain amount. It is not certain that the exact amount which is claimed as damages by the aggrieved party is necessarily decreed by the court; the court may reduce the amount or even increase it. Secondly, the right to sue for damages is personal to the party aggrieved. In the above illustrations it was *B* who was defamed or who incurred loss not the transferee *C*. It would be against the basic principles underlying the award of damages if compensation is received by a person who is not the aggrieved party.

In *Mc Dowell & Co. Ltd. v. District Registrar, Vishakhapatnam*,⁷⁴ a manufacturing company insured its goods with an insurance company for the loss or damage of its goods during transportation. The insurance company in turn was entitled to proceed directly against the transporter in the event of such loss or damage to the goods. A document, to this effect, was executed by manufacturer in favour of the insurance company wherein the manufacturer had subrogated (substituted) its right to sue the transporter for any loss or damage to goods in consideration of the payment of amount under insurance policy. The question arose as to whether this document was to be treated as conveyance (transfer of property) for purposes of stamp-duty? The Andhra Pradesh High Court held that the document was not a deed of conveyance because the right of manufacturer was 'mere right to sue' for damages and the same right (alone) was given to the insurance company. Accordingly, the Court held that the question of treating the disputed document as a document of conveyance or assignment would not arise; the document was a power of attorney (for stamp-duty) under which company had been given merely a right to sue for damages.

Claim of *mesne profits* is also a claim for an indefinite sum of money like damages; therefore, mere right to claim *mesne profits* is non-transferable under Section 6(e). *Mesne profits* means profits or produce of a property which is in the unlawful or adverse possession of a person who is not entitled to possess it. When the property comes in the possession of the person who is legally entitled to it, he may claim *mesne profits* from the possessor holding property adversely to him. Such claims are unliquidated and cannot be transferred.

Illustration

A is the owner of a piece of land which *B* occupies illegally. *A* files a suit against *B* to get back the possession of land held unlawfully by *B*. After two years of litigation, the court decides in favour of *A*, and *B* has to vacate the possession. But, during unlawful possession (*i.e.*, during litigation) *B* has already enjoyed the profits or produce of the land say crops of paddy. *A* is entitled to claim the *mesne profits* for the period of two years. *B* assigns this right to *C*. The assignment is invalid.

The social policy underlying the non-transferability of mere right to sue for unliquidated damages is to prohibit the practice of gambling out of litigation.⁷⁵ Under English Law, gambling out of litigation is known as *Chamerty* which is forbidden there. In India, such contracts would be void as being opposed to public policy under Section 23 of the Indian Contract Act.

Use of the word 'mere' is significant. Under this clause, it is the 'mere' right to sue which is non-transferable. If the right to sue is not a bare or 'the only' right but involves also an interest in the property, the right to sue is assignable. Together with the transfer of that interest, right to sue would be transferred. Thus, a right to sue for damages due to breach of contract cannot be transferred but, if the property for which the contract has been made, is itself transferred, the transferee gets also the right to sue for damages. In such situation the transferee would not have the bare or naked right to sue but would have the right to sue by virtue of ownership or beneficial interest in the property being transferred.

In *Jafer Meher Ali v. Budge Budge Jute Mills*,⁷⁶ under a contract *A* agrees to sell certain quantity of gunny bags to *B*. The gunny bags were agreed to be delivered by *A* to *B* on a future date. But before the expiry of the due date *B* assigns his beneficial interest in the said gunny bags to *C*. Thus, instead of *B*, the beneficial interest in the gunny bags was now with *C*. Thereafter *A* fails to deliver the bags before expiry of the due date and thereby committed a breach of contract (between *A* and *B*). *C* was entitled to sue *A* for damages because *B* had assigned to *C* not only the right to sue for breach of contract but also the beneficial interest in the gunny bags.

Where the right to sue is connected with a business and the whole business is transferred, the right to sue is automatically transferred. It is not the transfer of mere right to sue. A partnership firm entered into a contract with Government and all partners, except *X*, retired later on. According to the retirement deed all rights and liabilities of the firm were transferred to the remaining partner *X*. It was held by the Gujarat High Court that incidentally the right to sue for

⁷⁵ For example, *A* is entitled to claim damages from *B*. *A* would claim a high amount say Rs. 50,000/- as damages. Now *A* would sell his right to sue *B* to *C* for Rs. 30,000/-. The Court may reduce the amount claimed (Rs. 20,000) or increase it to Rs. 60,000/- or, even dismiss the suit. All this is uncertain and whether *C* would be looser or gainer would depend on 'chance'. This would amount gambling out of litigation.

⁷⁶ (1900) 33 Cal. 702 on appeal 34 Cal. 289 cited in *Mulla, TRANSFER OF PROPERTY ACT, Bd. IX, p. 102*.

damages was also transferred and a suit by X for damages for breach of contract against the Government was not hit by Section 6(e).⁷⁷

In *Aminathum Kudumbah v. Saranam Kudimbar*⁷⁸ the property of a minor was sold by his father as natural guardian but the sale was neither with the permission of the court nor for legal necessity, therefore, it was voidable at the instance of his son who was the real owner. Any person purchasing from the natural guardian obtains only defeasible title. The Supreme Court held that a purchaser of the property from the son (after his attaining majority) would be entitled to file a suit for setting aside the sale by guardian (father) within three years after the minor attained majority. The Supreme Court observed that the son had transferred the property on attaining majority and together with transfer of property his right to defeat existing adverse claim was also assignable (transferable) right. Therefore, Section 6(e) was held not applicable.

Transfer of a decree.—Decree is property of the decree holder but it is neither an actionable claim nor a 'mere right to sue'. Therefore, although the original cause of action for the claim (i.e. right to sue for a claim) is not transferable as such, but if the same claim has been established by the Court under a decree, it is assignable. For example, assignment of decree for *mesne profits* is a valid transfer.

(7) Clause (f) : Public Office & Salary of Public Officer.—Under this clause there is prohibition on the transfer of a public office and the salaries of public officers. The reason why these interests are non-transferable is, to ensure the dignity to the office held by a person appointed for qualities personal to him and getting salary for due discharge of his public duties.

Right to hold an office by virtue of which a person derives certain pecuniary gain is his beneficial interest whether that office is public or private. In both the cases a person is entitled to hold an office only because of his personal qualifications. As such, this right is a restricted interest. Right to hold a private office would come under clause (d) whereas right to hold public office comes under clause (f). This Act defines neither public office nor a public officer. However, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape whether from Government or otherwise, may be a public officer. A Government servant would be called a public servant holding a public office. A Government servant cannot assign his office to another person.

The salary of a public officer whether before or after it has become due, is also non-transferable. Attachment or transfer of the salary of a public officer is illegal and opposed to public policy. Thus, a railway servant cannot agree to the attachment of a part of his salary.⁷⁹ However, leaving apart a minimum amount for bare subsistence (exempted from attachment) the remaining salary can be attached in execution of a decree under Section 60 of the Civil Procedure Code.

77. *Gujarat Water Supply & Sewerage Bd. v. S. H. Shrivani*, AIR 1991 Guj. 171.

78. AIR 1991 S.C. 1356.

79. *M.S.M. Railway v. Rupchand*, AIR 1950 Bom. 155.

In *Ananthaya v. Subba Rao*⁸⁰ a younger brother agreed to pay a certain part of his earnings to his elder brother in consideration of the latter (elder brother) providing him (younger brother) maintenance and education in the past. The Madras High Court held that this agreement was not hit by clause (f) merely because the younger brother became a Government servant. The court observed that the agreement was not an agreement for the transfer of salary; the amount agreed to be paid could be paid from any other source. It is significant to note that the prohibition under this clause is regarding direct transfer of salary i.e. transfer or assignment from its source. Once the salary comes into the hands of a public servant, it becomes his property and is not subject to any restriction on its disposal.

(8) Clause (g) : Pensions and Stipends.—Under clause (g) the stipends allowed to military, naval, air force and civil pensioners of the Government and the political pensions, cannot be transferred. The pensions or stipends etc. of the Government servants whether civil or military, are non-transferable on the same principle on which the salaries of public servants are not transferable under the preceding clause. Pensions, stipends etc. of the Government servants or the political pensions (to the freedom fighters) are given to the person concerned only because of his past services or personal merits, therefore, these interests are personal to the recipient. Transferability of such interests would defeat the very purposes for which these interests exist.

Pension means a periodical allowance or stipend granted not in respect of any right or privilege or because of an office but on account of past services or particular merits or as compensation to the families and dependants.⁸¹ The allowance given to political prisoners⁸² and the payments being made by the Government of India under a treaty⁸³ have been held political pensions and not assignable under clause (g). Allowances granted by the Government to the Mysore family⁸⁴ and to the descendants of the Nawab of the Carnatic⁸⁵ have been held as political pensions.

The pension of a pensioner cannot be attached in the execution of any decree against him. Under Section 60 of the Civil Procedure Code, the pension of a pension-holder has been exempted from attachment. However, the prohibition under clause (g) does not apply to private pensions and such pensions can be attached or sold.⁸⁶

(9) Clause (h) : Transfer Opposed to Nature of Interest etc.—The above mentioned clauses provide certain kinds of interests which are non-

80. AIR 1960 Mad. 198.

81. *Secretary of State v. Kiron Chandra*, (1880) 4. Bom. 432; *Sundaraya Bai Choudhary v. Union of India*, AIR 2008 MP 227 (DB), a 'will' can be executed only in respect of an estate, family pension is not an estate, it could not be bequeathed by 'will' other pensionary benefits, like PF, gratuity, etc. and other retiral dues, and extra remuneration are estate of the deceased, capable of being disposed by bequest.

82. *Sethaji Dongarband v. Madhu Singh*, AIR 1927 Mad. 604.

83. *Bishambhar Nath v. India Ali*, (1891) 18 Cal. 216.

84. *Mahomed v. Mahomed*, (1867) 7 W.R. 169.

85. *Mahomed v. Commendur*, (1869) 4. Mad H.C. 277.

86. *Bhoyrab v. Madhub Chunder*, (1880) 6 Cal. L.R. 19.

transferable. This clause does not deal with any 'kind' of non-transferable interest. Under clause (h) there is prohibition in the transfer of property under certain 'situations'. Clause (h) provides that no transfer can be made in the following cases :

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- (i) Where the transfer is opposed to the nature of interest created thereby.
- (ii) Where the transfer is for an unlawful object or consideration.
- (iii) Where the transfer is made to a person who is legally disqualified to be transferee.

(i) *Transfer opposed to Nature of interest.*—There are certain properties which by their very nature can neither be owned nor transferred. For example, air, light, space, sea are such properties which in their natural form are nobody's property. Such properties are called *res communes* i.e. property of the whole community of the world. Nature gives the right to use them to every individual. Their transfer would be opposed to nature of these properties. Moreover, it is not possible to hold and possess them separately. Thus, A who is owner of a piece of land, cannot sell only 100 sq. meters of light, air or space above his land to B without selling him the land.

Other things which come under this category are the properties dedicated for religious or public use. *Debutter* property, for example, is non-transferable as being dedicated for religious use only.

(ii) *Transfer where its object or consideration is unlawful.*—Any property which is otherwise transferable shall become non-transferable if the object or consideration of the transfer is unlawful within the meaning of Section 23 of the Indian Contract Act 1872.⁸⁷

Under this sub-clause, the object or consideration of a transfer of property is unlawful in the following situations :

- (a) It is forbidden by law,
- (b) It is of such nature that if permitted it would defeat the provision of any law or,
- (c) It is fraudulent or,
- (d) It involves injury to a person or property of the other or,
- (e) It is immoral or opposed to public policy.

Right to grow opium without a licence is forbidden under the Opium Act. Therefore sale of a farm for growing opium is unlawful and the transfer is void. Similarly, sale of liquor without licence is forbidden without a valid licence under the Excise Act. Therefore, any such sale would be void being forbidden by law.

Where the object (purpose) of a transfer is to defeat or negative the effect of any provision of law, the object is unlawful because law is made for being

87. *L.I.C. of India, Madras v. D. B. Kaddanai*, A.I.R. 1987 Kant. 129.

followed not for being violated or exploited. Thus, transfer of property by an insolvent would defeat the provisions of the Insolvency Act or, the renewal of lease (tenancy) with the object of getting higher rent would defeat the provisions of the Rent Acts.

Transfer of property with the only object to play fraud on the interests of a person would be fraudulent transfer. Where a debtor transfers his properties so that the creditor may not recover his loan from his properties, the transfer would be for an unlawful object. Similarly, where a person gives one thousand rupees to an agent in consideration of the agent granting lease of properties without the knowledge of his principal, the transfer of rupees one thousand to the agent is unlawful.

Where a property is transferred or is agreed to be transferred in order to cause injury to a person or his property, the transfer is for an unlawful object. If A gives to B Rs. 1000 so that B assaults C or commits his murder or, destroys C's house by burning it, the transfer of Rs. 1000 is void being unlawful. It has been held that payment made to a Hindu father so that he gives his son in adoption, is unlawful because such adoption would be set aside by the Court and the son may lose his status in both, natural family as well as in the adoptive family.⁸⁸

Transfer of property is void if its purpose is immoral or against public policy. Lease of a house to be used as gambling den or as a brothel is void if the lessor (landlord) has knowledge that it is to be used for such immoral purposes. Transfer of property to a husband so that he must divorce his wife is with an unlawful object hence void. Similarly, transfer of some immovable property to a woman in consideration of illicit relationship in future is void.⁸⁹ But, transfer of property for past illicit relationship has been held valid as being a gift motivated for past services (cohabitation) not with object of an unlawful purpose.⁹⁰

Property transferred as consideration for withdrawal of a prosecution or money or property given to an official as bribe is illegal being opposed to public policy. Property given to a witness not to give evidence is also a transfer opposed to public policy.

(iii) *Transfer made to a disqualified transferee.*—As discussed in Section 5 of the Act, any living person in existence can be a competent transferee. But, the transferee must not be legally disqualified to be a transferee. Under Section 136 of this Act, judges, legal practitioners or officers connected with any Court of justice are incompetent transferees in any dealings of actionable claims. Thus, an actionable claim is otherwise transferable but when it is transferred to a judge or an officer of the Court, it becomes a non-transferable property. The object of this provision, it is submitted, is to secure and maintain the impartiality of the judiciary. However, the prohibition under this clause is only with respect to actionable claims not for other kinds of property. Thus, for

88. *Narayan v. Gopalrao*, A.I.R. 1922 Bom. 382.

89. *Ghimna v. Ram Chandra*, A.I.R. 1925 All. 437.

90. *Nagratramba v. Ramayya*, A.I.R. 1968 S.C. 253; *Pure Mohan v. Narajanti*, A.I.R. 1982 Raj. 43.

a debt secured by mortgage, the Judges or the officers of the Court are not legally disqualified transferees.

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(10) **Clause (i) : Untransferable Right of Occupancy.**—As a general rule occupancy rights or the leasehold properties are transferable interests. But this clause makes an exception to this general rule. Similar exception has been made in the proviso to Section 103 (i) of this Act dealing with the untransferability of leases in general. Under Section 6(i), a tenant having untransferable right of occupancy cannot transfer his right to another person. Similarly, a farmer of an estate in respect of which default has been made in paying revenue is not authorized to assign his interest in the agricultural holding. Relinquishment of the agricultural holding is a transfer, therefore, it is not valid under this clause.⁹¹ Lessee of an estate under the management of a Court of Wards is also prohibited to assign his interest.

Clause (i) was added to Section 6 in 1885 in order to remove doubts regarding the non-transferability of occupancy rights in the agricultural lands. Occupancy rights of the agricultural lands have been declared to be non-transferable interests also in various tenancy land laws enforced in India.

Note : When India became independent, the States of this country enacted their own land laws to regulate their respective agricultural lands etc. U.P.Z.A. & L.R. Act in Uttar Pradesh, Madhya Pradesh L.R.C. or Rajasthan Z.L.R. etc. Therefore, Section 6(i) of the Transfer of Property Act has now become almost irrelevant.

(7) **Person competent to transfer.**—Every person competent to contract and entitled to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

SYNOPSIS

- Essentials of a valid transfer.
- Competency of the Transferor.
 - Competent to Contract.
 - Age of majority.
 - Soundness of mind.
 - Not otherwise disqualified.
- Entitled to Transfer : authority for Transfer.

ESSENTIALS OF A VALID TRANSFER

Transfer of property is an act by which a living person conveys certain properties absolutely or conditionally and in present or in future, to another living person. In a valid transfer of property, following essential conditions must be fulfilled:

91. *Amar Nath Singh v. Har Prasad Singh* (1932) Oudh 79.

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(1) *The property must be a transferable property.* According to Section 6 of the Act, there should not be any prohibition in the transfer of that property by any law enforced in India. Section 6 also specifies certain non-transferable interest e.g., *Spes-successionis*, right of re-entry, easements etc. etc. Transfer of any non-transferable property is void.

(2) *Transferor must be competent.* Transferor is the person who conveys property. Person may be a human person or a juristic person such as company or corporation, or association. But at the time of transfer, the transferor must be a competent person. According to Section 7, any person who is competent to contract is also competent to transfer a property. Thus, any person who is adult (i.e., attained the age of majority), has a sound mind and is not otherwise disqualified, is competent to transfer a property. Juristic persons e.g., companies or associations are always deemed to be adult and of sound mind.

(3) *The transferor must also have right to transfer the property being transferred.* Every adult person of sound mind may have capacity to transfer but has a right to transfer only those properties or interests in which he has ownership. According to Section 7, besides being competent, the transferor must also have the title in the property. That is to say, he should be entitled to transfer the property concerned or be authorized to transfer it if not his own. A tenant cannot make a gift of the house in which he is tenant because although he is sane and adult, but is not owner of the house and is, therefore, not entitled to transfer its ownership by way of gift.

(4) *Transferee must also be competent.* But, the transferee need not have the capacity, i.e., age of majority and sound mind. All that is required for being a competent transferee is that the transferee is a living person in existence at the date of the transfer. Thus, a transferee may be an insane person or minor or even a child in mother's womb (provided it is born alive). However, the transferee should not be legally disqualified to be a transferee. Officials of the Court or judges cannot be transferees of actionable claims under Section 6(ii) (iii) of the Transfer of Property Act. Transferee too may be a human person or a juristic person.

(5) *Necessary formalities prescribed by law for the transfer must also be completed.* The Transfer of Property Act makes provision for various kinds of transfer of property e.g., sale, gift, exchange, mortgage, lease and the transfer of actionable claims. These specific kinds of transfer have their respective procedure as laid down in this Act or in the Indian Registration Act. Generally, there are two modes of transfer of property, registration and delivery of possession. In some cases writing is sufficient. Where writing is not necessary, the transfer may be made without registration and writing i.e., simply by delivery of possession. Every transfer of property must be made in the manner prescribed for that kind of transfer and for that kind of property.

COMPETENCY OF THE TRANSFEROR

Section 7 of the Act provides for the competency of a transferor. Under this section a person is competent to transfer a property if he is (1) competent to contract and (2) entitled to transfer or is authorised to transfer the property, if not his own.

(1) **Competent to Contract.**—According to Section 11 of the Indian Contract Act, 1872, a person is competent to contract if he is (i) of the age of majority (ii) of sound mind and (iii) is not otherwise disqualified from contracting by any law. A person who is competent to contract is competent to transfer a property.

(i) **Age of majority.**—When the transfer is being made, the transferor must be an adult person i.e. must have attained the age of majority. Under Section 3 of the Indian Majority Act 1875, a person attains majority at the age of eighteen years. But, if a guardian has been appointed under the Guardian & Wards Act, 1890, the minor attains majority at the age of twenty-one years. A person who is below the age of eighteen years (or twenty-one years, as the case may be), is a minor. Transfer of property by a minor is void and cannot be validated by his subsequent ratification on attaining his age of majority.⁹²

(ii) **Soundness of mind.**—Transferor must possess a sound mind at the time of the transfer i.e. he must not be of unsound mind. Unsoundness of mind is of two kinds, idiocy and lunacy. Idiocy is incurable and permanent. Transfer of property by an idiot or insane person is void. Lunacy is not permanent and a lunatic may sometimes possess a sound mind. Such period is called 'lucid interval'. Transfer of property by a lunatic during 'lucid interval' is valid. However, if a person has been adjudged lunatic by a Court, he is incompetent to make transfer even during lucid interval.

(iii) **Not otherwise disqualified.**—The transferor must be free from any legal disqualification. Disqualification means legal inability. Minority and insanity are legal disabilities. But, besides these, there might be other legal disabilities or disqualifications. Here, 'not otherwise legally disqualified' means that the transferor should not be legally prohibited to transfer the property by any other law to which he is subject. For example, a judgment debtor whose property is being sold in execution of decree, is legally disqualified to transfer his own properties. Similarly, where a person's properties are under the management of Court of Wards, he is legally disqualified to transfer any interest in his property or create a charge over it.

(2) **Entitled to Transfer: Authority for Transfer.**—The transferor must be entitled to transfer the property concerned. He is entitled to transfer the property if he has title of the property or if he has no such title, has got the authority to transfer it. No person is entitled to transfer any interest which he himself does not have at the time of transfer. If a person is transferring absolute interest he must have ownership in the property. If he is transferring partial interest he should have partial interest in the property. For example, where a person makes a sale or gift of a property he must have ownership (absolute interest) in the property. If a person makes a sub-lease of certain property he must be lessee of that property. Without having title or interest in the

property, the transferor has no right to transfer it.⁹³ But a person who is not owner of a property may have right to transfer that property under an authority given to him by the owner of such property. Thus, an agent who is authorized by the principal to transfer certain property, has right to transfer that property. However an agent who has not been given any express authority also to transfer the property has no authority to transfer any property in his management.⁹⁴ The authority to transfer is given under power of attorney. Thus, transfer a property which is not his own. Other instances where a person is authorised to transfer property not his own are the manager of a joint Hindu family in the case of legal necessity, a guardian of any minor appointed under the Guardian & Wards Act, an executor or administrator having authority to transfer the property of a deceased under the Indian Succession Act. It may be noted that in these cases, the transferor's right of disposal has been defined and limited by the personal laws or statutory laws.

An agreement for sale of an immovable property was not joined by one of the co-sharers. It was held that the entire agreement comprising the whole of the property including the share of the signing co-sharer was void and ineffective.^{95a}

8. **Operation of transfer.**—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incident include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer and all things attached to the earth;

and, where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexed thereto; the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities thereof (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

93. *Attur Rahman Fath Md. v. Hari Bhand*, AIR 2008 NOC 1920 (Bom.), person not holding transferable interest in property cannot transfer it. The transferee is not bound by an agreement executed by such transferor. *M. P. Waf Bhand v. Sudham Shah*, (2006) 10 SC 696, the

94. *Bolai C. Mondal v. Indira Devi Dahi*, AIR 1973 S.C. 752.

95a. *Vinodchander Nageshwar Shet v. Nour Ahmed Shariff*, AIR 2011 SC 2057 : (2011) 12 SCC 658.

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

SYNOPSIS

- Unqualified or, Un-conditional Transfer.
- Legal Incidents of Transfer.
 - Land.
 - Machinery.
 - House.
 - Debts.
 - Interest.
 - Leased property.
- Unless different intention is expressed or implied.

Property consists of interests. Interests of the property have several incident or things appertaining to it. When a property is transferred, there is transfer of the interests and together with them their incidents also pass on to the transferee. The transferor need not specify each and every incident which shall pass on to the transferee. But, if transferor so desires, he may express that a particular interest shall remain with him or otherwise shall not go to the transferee. Such intention must be clearly expressed or be necessarily implied in the absence of which it is presumed that transfer of the property passes forthwith to the transferee all the interests which the transferor is then capable of passing in the property, and in the legal incidents thereof. Section 8 incorporates following provisions of law respecting operation of a transfer:

(1) An unqualified or, unconditional transfer conveys all the interests of the property possessed by the transferor.

(2) Legal incidents appertaining to the property transferred also pass on to the transferee.

(3) For any different intention of the transferor, the rule of interpretation is that it is to be inferred from the surrounding circumstances and by construing the whole instrument.

Unqualified or, Un-conditional Transfer

Transfer of property may be subject to certain conditions or reservations respecting the interests being transferred or, without any such condition. Where the transferor does not lay down any condition it is presumed that the transfer is unqualified. In other words, if a transferor does not express any 'contrary intention' the transfer is deemed to be unconditional or unqualified. In an unqualified transfer, the transferor simply expresses his intention of transferring the property by way of some specified mode. For example, if the transferor intends to transfer the ownership of his house without any consideration, he would execute a deed of gift. Such deed of gift results into the passing of an absolute interests in the house to the donee and also all the legal incidents belonging to it. He need not mention the details of the interests and their legal incidents; the law shall presume that the transferor intends to pass

on to the donee everything connected with the house. It may be noted that the object of the first paragraph of this section is to establish title of the transferee beyond any doubt as to what has been given to him and what not. If no contrary intention is expressed or is implied, upon the registration of the deed, title passes forthwith to the transferee with all the interest which the transferor has been capable of passing in the property and the legal incidents thereof.⁹⁵

Legal Incidents of Transfer

Legal incidents of a property are everything which belong to that property by way of its necessary consequence or which necessarily depend on such property. Thus, a house has several incidents appertaining to it, such as, right of easement, right of enjoyment, right to get rent from it etc. etc., and also the duty to pay its revenue of taxes. If the owner of the house sells it, the purchaser shall get not only the building or the material structure but also all its legal incidents. Certain properties and the legal incidents which pass on to the transferee upon transfer are given below:

Land.—The legal incidents of a piece of land include (i) everything annexed to it for permanent enjoyment, (ii) the beneficial interests arising out of the land and (iii) the things attached to the earth. In the absence of any contrary intention, transfer of the land would include transfer of everything annexed to it permanently i.e. everything which is part and parcel of the land and also everything beneath the land. Thus, the transferee shall get not only the surface of the land but also the easements annexed to the land and also the minerals beneath it.⁹⁶ Transfer of land includes also the transfer of beneficial interests arising out of land, such as, right to collect rent or other profits or produce. However, rents and profits which accrued *before* the transfer do not pass on to the transferee.⁹⁷ Similarly, where land is transferred, all the houses, structures standing thereon including the trees on the land pass by necessary implication and it is not necessary to mention them.⁹⁸

Where a land is let out to a tenant, the right to the fruit-trees standing on that land passes in the absence of express reservation. In *Visram Nath v. Ram Raj*⁹⁹ the Allahabad High Court held that when land is transferred, there may be a presumption that all things attached to earth, such as, trees and shrubs are also transferred along with the land. But there cannot be such presumption *vice versa*. Thus, the Court held, transfer of trees will not by itself justify the inference that the land was also transferred.

It is to be noted that the general rule of interpretation of documents transferring interest in a property is that if the language is plain and unambiguous only that is to be adhered to.¹ Therefore, whereunder a document only trees have been transferred, there cannot be a presumption that land on which the tree stands has also been transferred.

95. *Harbans Singh v. Takamuti Devi*, AIR 1990 Pat. 26.

96. *Raja Ahmad v. U.P. State*, AIR 1967 S.C. 1081.

97. *Bhogilal v. Jethalal*, AIR 1929 Bom. 51.

98. *Divisional Forest Officer v. Dauli*, AIR 1968 S.C. 612.

99. AIR 1991 All. 193.

1. *Shyam Sunder Ginterwalia v. Delta International Ltd.*, AIR 1998 Cal. 233.

Machinery.—Where a machinery is part of land, together with land such machinery is also transferred and alongwith such machinery are transferred its nuts, bolts and other parts. Nut-bolts and other accessories of a machinery are legal incidents of the machinery because without them, there is no utility of it and machinery becomes a useless thing.

House.—Legal incidents of a house are the easements, such as, right of way, right of support, and any *quasi-easement* or easement of necessity annexed to the house. House includes also the permanent fixtures e.g. doors, windows, locks, keys, bars etc. which are part of the house and have separate existence. When a house is sold, the purchaser gets right of easements annexed to it, its doors and windows etc. and the seller need not specify the sale of each and every part of the house.

Debts.—Legal incident of debts is the security for the debt. Thus, in an unqualified transfer of debt or actionable claim, the security also passes on to the transferee alongwith the debt. However, the 'debt' as contemplated here must be perfected and absolute, not of uncertain nature. Section 8 refers to property in existence at the date of the transfer.

The word 'debt' as used in this section refers to only those debts which come within the general definition of actionable claims. Since mortgage-debts are not actionable claims and are excluded in the definition, therefore, the provisions of this section do not apply to mortgage-debts.² A debt secured by a charge is not like a mortgage-debt; it may be assigned as an actionable claim by an unregistered instrument. Thus, in the assignment of debt, the charge annexed to it also passes on to the transferee.³

Interest.—The last clause of Section 8 provides that where the property transferred is money or other property yielding income, the transferee is entitled to get the interest on that money or other income accruing to it after the transfer.

The list of 'incidents' of properties mentioned in Section 8 is not exhaustive. There may be other incidents which pass on to the transferee. For example, benefit of a covenant which runs with the land under Section 55(2) or under Section 65 or under Section 108(a) pass on the transferee with the transfer of property to which these covenants relate.

Leased property.—The relationship of landlord and tenant comes into existence on the transfer of a leased property. Attornment by the lessee is not necessary. Termination of the tenancy by the transferee landlord on the ground of arrears of rent was held to be valid.⁴

Taxes, excise, etc.—A sale deed stipulated that the statutory liabilities arising out of land, building and machinery was to be borne by the vendee. The Court said that excise duty is not liability arising out of land, building or machinery. It is payable on manufacturing of excisable goods. The stipulation in the sale deed did not cover excise dues. The purchaser was not liable to pay excise dues of the seller.⁵

² *Atmasthan v. Subramania*, (1907) 30 Mad. 235.

³ *Shree Nandlal Lal v. Zamil*, (1915) 42 Cal. 849; But see *Mulla's*, TRANSFER OF PROPERTY ACT, 1882, ¶ 11, p. 35 for other views.

⁴ *Chandmal v. Kumar v. Darsah Kumar*, AIR 2008 NOC 1416 Ut.

⁵ *Revan Girdar's Ltd. v. Union of India*, AIR 2013 SC 3422.

Unless different intention is expressed or implied.—An unqualified transfer results into transfer of all the interests and legal incidents related to the property transferred. But, it is possible that transferor reserves some of the interests with him and provides expressly that a particular interest or incident of the property may not pass off to the transferee. Where transferor does not make any express reservation or uses ambiguous words, the intention of the transferor is gathered by construing the whole instrument for what he wants to express his intention by using an appropriate word for what he intends to transfer. For example, if he uses the word 'lease', it would mean that he intends to transfer only the right of occupancy not ownership. But sometimes the words are not clear. Here intention prevails. Thus, upon execution of the deed of sale, the question as to whether title passes to the vendee or not depends upon the intention of the parties.⁶ In *Provasi Chandra Dalai v. Bisramnath Banerjee*⁷ the Supreme Court observed that in the construction of a written instrument it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful, it is legitimate to have regard to the circumstances surrounding their creation and the subject matter for which it was designed and intended. The section does not talk about the specific words to be used for the transfer of any particular kind of property. Intent and surrounding circumstances prevail over the nomenclature.

What interest or property has been conveyed by the deed depends on its own terms. The Patna High Court held that where there is a grant of mining lease and a map is annexed to the grant showing an area lesser than what is stated in the grant, the terms of the grant must prevail over the map.⁸ In *N. B. Subrahmaniam v. A. Hymanati*⁹ the deed created rights and interests in 'present' in favour of settlor regarding properties mentioned in it with life-estate for enjoyment of settlor's life. The settlor was to acquire right to enjoyment, alienation etc. after the death of settlor. The Supreme Court observed that the deed was a settlement-deed and not a will. Therefore, the Court held that the settlor could not subsequently bequeath the same property in favour of another person.

Similarly, the nature of transaction too is to be construed in the light of intention and the surrounding circumstance instead of specific words used for the transfer. In *Smit Kunari v. Lakshmi Anima Janki Anima*,¹⁰ A, who was heavily indebted, executed a sale deed to get back his property which was sold in the execution. B, the purchaser, executed an agreement to sell the property (after 10 years) to a close relative of A on the same day. Both documents were executed immediately one after the other and were also registered simultaneously one after the other. The Supreme Court observed that surrounding circumstances and the act of parties shows that the intention was to reconvey the property to A. Accordingly, the Court held that the transaction was not a sale but a mortgage by conditional sale.

⁵ *Lakshmi Nandan Barmal v. Jagdish Singh*, AIR 1991 Pat. 99.

⁶ AIR 1989 SC 1834.

⁷ *S.A.A. Pvt. Ltd. v. Municipal Corpn. for Greater Bombay*, AIR 1990 Bom. 339.

⁸ *Narain Prasad v. The State of Bihar*, AIR 1983 Pat. 244.

⁹ AIR 1996 SC 2220.

¹⁰ AIR 2000 SC 3009.

The Supreme Court observed that in the matter of construction of an agreement, the heading of the agreement is not conclusive of its character. The intention of the parties has to be gathered from the document as a whole reading it in its entirety.¹¹

9. Oral transfer.—A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

SYNOPSIS

- Modes of Transfer.
- Delivery of possession.
- Registration.

MODES OF TRANSFER

This section refers to modes of transfer and provides that where writing is not necessary under this Act, the property may be transferred orally i.e. without writing; any deed. There are two modes of transfer of property : (a) delivery of possession and (b) registration.

(a) Delivery of possession.—Where writing is not necessary under the Act, the property may be transferred orally i.e. only by delivery of possession. Normally the movable properties may be transferred by delivery of possession. But, other kinds of properties in which writing is not necessary under the Act, may also be transferred orally. For example, sale of immovable property valuing less than one-hundred rupees (except in Uttar Pradesh), month to month tenancy, mortgage by deposit of title-deeds, exchange of immovable property valuing less than rupees one-hundred. Where writing is not necessary registration is also not necessary.

(b) Registration.—Where registration is necessary, the transfer must be in writing. The Transfer of Property Act, at appropriate places, has provided that following transfers must be made only through a written deed duly registered :

- (1) Gift of an immovable property (S. 123).
- (2) Sale of an immovable property of or exceeding rupees one-hundred in value (S. 54).
- (3) Sale of reversion or other intangible property irrespective of its value (S. 54).
- (4) Leases from year to year or for a term exceeding one year or reserving a yearly rent (S. 107).
- (5) Simple mortgage irrespective of the amount secured (S. 59).
- (6) Other kinds of mortgage (except mortgage by deposit of title-deeds) where the sum secured exceeds rupees one-hundred (S. 59).
- (7) Exchange of immovable property exceeding rupees one-hundred (S. 118).
- (8) Transfer of actionable claims (registration is not necessary, writing is sufficient (S. 130)).

11. *C. Chertalman v. P. Narayanaiah Emlam Thiri*, AIR 2009 SC 1502.

In the abovementioned cases the transfer cannot be made orally. Except in the transfer of actionable claims (where writing is must but registration is not necessary) the transfers required to be made through instruments or written deeds, registration is also necessary. Procedure for the registration of documents and the transfers which are compulsorily registrable are given in the Indian Registration Act, 1908 and are governed by this Act. Where writing and registration is necessary to effect a transfer, the property cannot be transferred in any other manner. If such transfer are made without registration the transfer is void. Gift of an immovable property must be made only by a written and duly registered deed¹² therefore an unregistered deed of gift of an immovable property cannot effect a valid transfer.¹³

A registered settlement deed was not allowed to be cancelled by the settlor all by himself. Such unilateral deed of cancellation was not allowed to be registered. Both parties must join. Alternatively, the aggrieved party can apply to the Court under Section 31 of the Specific Relief Act, 1963 for an order of cancellation.^{13a}

10. Condition restraining alienation.—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Mohammedan or Buddhist), so that she shall not have power during her marriage to transfer or change the same or her beneficial interest therein.

SYNOPSIS

- Conditional Transfer.
- Absolute Restraint.
- Partial Restraint.
- Restraint on alienation in compromises.
- Applicability of Section 10.
- Exceptions.
- Married Women.
- Leases.
- Idol.

Conditional Transfers.—Every owner of property who is competent to transfer, has freedom of transferring his properties either unconditionally or subject to certain conditions. In a transfer of property where a condition is laid down by the transferor, the transfer is a 'conditional transfer'.¹⁴ Conditions are

12. Except where the donor is a Muslim. Where donor is Muslim, gift may be made only by declaration, acceptance and delivery of possession. See Section 123, TPA.

13. *Hira Lal v. Gaurishankar*, AIR 1928 Bom 250.

13a. *V. Ethiraj v. S. Sridhar*, AIR 2014 Kant. 58.

14. For details about the conditional transfers see comments on Sections 25, 31 etc. *infra*.

limitations which limit or otherwise affect the transfer. Condition may be (i) condition precedent or (ii) condition subsequent. Condition precedent is that condition which is prior to the transfer of property and whether the transfer would take place or not, is itself dependent on that condition. Condition subsequent is a condition which is required to be fulfilled after the transfer of property has already taken place. That is to say, a condition subsequent affects the interest of the transferee after the transfer. Sections 10, 11, 12 and 17 of the Act deal with condition subsequent. In these sections, certain conditions subsequent have been declared void. Void condition subsequent has no effect and the transferee is not bound by it; he may or may not fulfil it.

Right of disposal is one of the essential features of ownership. Section 10 incorporates the rule that any restriction on the right of disposal would be against this essential feature of ownership rights. Accordingly, Section 10 provides that if a transfer is made subject to a condition by which the transferee (who now becomes owner) is *absolutely* restrained from disposing of or parting with his interest in the property, the condition is void. In such cases since the transferee becomes owner of that property, any restriction limiting his right of disposing the property would not be binding on him and he would be free to transfer it to anybody by any means. For example, A makes a gift of his house to B subject to the condition that B shall not sell it. The condition being absolute restraint on B's right of disposal, is void and B is not bound by it. If he sells the property, the sale is valid.

ABSOLUTE RESTRAINT

Section 10 declares a condition to be void when it *absolutely* restrains alienation. Restraint on alienation is absolute if it totally takes away or curtails the right of disposal. Fry LJ observed thus:

"From the earliest times, the courts have always *leaned* against any device to render an estate inalienable."¹⁵

The restraint may be absolute as a restriction on the power of alienation in point of time or as to a particular or specified person only or of any other form. Partial restraints are not prohibited. The question whether the restraint in question is absolute or partial is to be gathered from the contents of the deed. The words of the clause should be so interpreted as to bring them into harmony with other provisions of the deed.¹⁶

Illustrations

- (i) A sells his house to B with a condition that B cannot transfer this house to anyone except C. The condition is void because C may be chosen as a person who may never purchase the property.
- (ii) There is a partition of a joint family property between A, B, C and D in which they agree that if any one of them have no issue, he will have no right to sell his share and leave it for the other sharers. A sells his share and after sometime, dies issueless. The condition being absolute restraint on alienation is void. B, C and D cannot recover the property from the purchaser.

¹⁵ In *re Perry and Duggs*, (1886) 31 Ch. D. 130 cited in *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XIII, p. 111.

¹⁶ *Thomas v. Dr. A.A. Henry*, AIR 2008 NOC 1414 (Ker) (DB).

- (iii) A testator makes a will of certain properties in favour of his son with a condition that if he sold it during the lifetime of his wife she will have an option of purchasing the property at the rate of one-fifth of the market value. This condition is an absolute restraint on the power of legatee (son) for a particular time. Here, the condition is void because it is restraining alienation during a 'life time'.¹⁷

- (iv) A husband settles his properties on his wives subject to a condition that they cannot transfer the property without his consent. The condition is void as it takes away the power of alienation of the wives absolutely.¹⁸

- (v) There is sale of certain lands through registered sale-deed. Immediately after the sale, the seller and purchaser enter into an agreement according to which the purchaser or his heirs shall have no right to alienate the said lands. The *agreement* is void as being violative of Section 10 of the Transfer of Property Act. The purchaser and his heirs are free to transfer or otherwise dissipate the land.¹⁹

- (vi) An absolute right was vested in the defendant, an adopted son, in respect of properties bequeathed to him under a "will". It was held that no further condition could be imposed, as per Sections 10 and 11, restraining alienation of the property or by creating a restriction repugnant to the interest created in the property. The will contained a direction that the property was to be applied and enjoyed in a particular manner. The legatee would receive it in a manner as if the "will" contained no such condition, by virtue of the provision in Section 138 of the Succession Act.^{19a}

PARTIAL RESTRAINT

Section 10 is silent about the situation where the restraint is partial. Where the restraint does not take away the power of alienation of the transferee substantially but only limits it to some extent, the restraint is partial. A partial restraint is valid and enforceable. In *Muhammad Raza v. Abbas Bandi Bibi*,²⁰ the condition restricted the transferee from transferring the property to strangers, i.e., outside the family of the transferor, the *Privy Council* held that the condition was merely a partial restraint which was valid and enforceable. Similarly, where a condition was included in the sale deed that the property should not be sold outside the family of the vendor but the transferee sold it to the first cousin of the vendor, the Bombay High Court held that the condition was a partial restraint and valid. The Court observed that the first cousin very much belonged to the vendor's stock (family).²¹

¹⁷ *Rosher v. Rosher*, (1884) 26 Ch. D. 801.

¹⁸ *Gomti Singh v. Amini Kumar*, AIR 1929 ALL 492. This case is based on the Hindu Law prior to the enforcement of the Hindu Marriage Act, 1955.

¹⁹ *Brahma Nand v. Roshani Devi*, AIR 1989 HP 11; However, agreement in restraint of alienation is void under Sec. 10 only if such agreement is registered; Unregistered agreement operates as personal covenant which is binding on the parties. (See *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VII, p. 92).

^{19a} *Ashwanti v. Rajmuncham Kuthillegan*, AIR 2010 Mad 34.

²⁰ *Munshir Shivan Suman v. Mahadeo Guruling Suman*, AIR 1988 Bom. 116; *Dinesh Chandra v. State of Orissa*, AIR 2008 NOC 84 (Or) (DB), a lease of land was heritable and transferable, a restriction that its alienation was to be only with the permission of the Collector was treated as void.

A piece of land was purchased, not acquired, for the purposes of a University. Subsequently the land was transferred to a Development Authority for housing complex. The sale deed contained no restriction on use. The University had no objection. The Court held that the erstwhile landowners who had a decade ago transferred their land at full value could not be permitted to question the use of land.^{21a}

Restraint on alienation in compromises.—Section 10 provides that where a property is transferred subject to any condition absolutely restraining the transferee from disposing of the property, the condition is void. Compromise is not a transfer of property within the meaning of Section 5 of this Act. Therefore, Section 10 is not applicable to compromises made in family settlements and such a compromise is valid even if it involves any restraint on alienation. In *Mata Prasad v. Nageshwar Sahni*,²² there was a dispute over succession to the properties of the deceased between his nephew and his widow. It was compromised between them under which the widow was to hold the possession of the property for her life while admitting the title of the nephew but nephew was restrained from transferring the property during the life of the widow. The Privy Council held that the compromise was valid and enforceable and could not be treated as a condition restraining alienation.

Applicability of Section 10.—The provisions laid down in Section 10 are based on the rule of equity, that property should not be made inalienable permanently. Therefore, the provisions of this section may be applied also to those transfers which are not governed by this Act. For example, Section 10 has been applied to transfers in Punjab where the Transfer of Property Act is not applicable²³ or it has been made applicable to a transfer to a Hindu idol which is outside the scope of this Act.²⁴

However, the law laid down under Section 10 does not apply where the transfer is by operation of law. Therefore, the general restriction on assignment does not apply to an assignment by order of the Court or an assignment made under any law. Restraint on alienation included in a sale by the order of the Court under an execution would not be void under Section 10.²⁵ In *Laxminarra v. State of Karnataka*,²⁶ it was held that a grant made by Government in accordance with law is not a transfer within the meaning of this Act; therefore, a permanent restraint on alienation of the grant, if authorized by law applicable to such grants, would be a valid restraint.

EXCEPTIONS

Section 10 makes two exceptions to the general rule that conditions absolutely restraining alienation are void. The first exception is in respect of

21a. *Jagtar Singh v. State of Punjab*, A.I.R. 2012 P & H 145. The acceptance of the purchase by the Vice-Chancellor of the University was an additional endorsement, not affecting the status of the State Government as a transferee.

22. A.I.R. 1925 P.C. 272.

23. *Nand Singh v. Prinsip Das*, A.I.R. 1924 Lah. 674.

24. *Bomhundarji Maharaj v. Lalji Singh*, A.I.R. 1959 Pat. 49.

25. *Mahendra v. Gagan Chandra*, A.I.R. 1925 Cal. 471.

26. A.I.R. 1983 Kam. 237.

leases and the second is regarding a property which is transferred to a married woman.

Leases.—Lease is a transfer of limited interest where the transferor (lessor) reserves the ownership and transfers only the right of enjoyment to the transferee (lessee). Therefore, a lessor can impose a condition on the lessee that he shall have no right to sub-lease or assign his interest to another person. Such condition, although it is a restraint on the lessee (transferee) against alienation, is valid and he cannot transfer his interest without the consent of the lessor.

The exception with regard to leases is applicable also to permanent or perpetual leases. In *Raghunam Rao v. Eric P. Mathias*,²⁷ the Supreme Court held, in the case of perpetual leases, too, any condition restraining the lessee from alienating leasehold property is not illegal or void. Explaining the law on this point the Supreme Court observed:

"This section does not carve out any exception with regard to perpetual or permanent lease. It applies to permanent or temporary lease. In view of the specific exception carved out in case of lease, in our view, there is no substance in the contention.....that the condition which restrains the lessee from alienating (perpetual) leasehold property is in any way illegal or void."

Thus, a condition in a perpetual lease that lessee's right is not transferable, is a valid condition. If the lessor does not expressly say that breach of this condition would terminate the lease then, upon the breach of such restraint (i.e. where lessee transfers his interest) the remedy of the lessor is not a suit for ejectment. The lessor can file a suit against the lessee only for injunction and damages for the breach of condition.

Married Women.—Where a property is transferred to a married woman who is not a Hindu, Muslim or Buddhist, the transferor can validly impose a condition restraining alienation. Such condition shall not be void under Section 10. Similar provisions are there in the Married Women's Right to Property Act, 1874 which is applicable to married women who are not Hindu, Muslim or Buddhist. The personal laws of Hindus, Muslims and the Buddhists already provide for the validity of restraint on alienation of the married women of these communities. Thus, a property may be transferred to a married Hindu woman for her life with a condition that she cannot transfer it. Reason behind such a restraint is to safeguard the interest of the married women who could be easily exploited by their unscrupulous husbands.

Idol.—A deed dedicating property to deity contained a condition absolutely restraining its transfer. The deed was held to be valid. Section 10 did not apply as a deity is not a living person. Protection from alienation of minors property is also available to the property of a deity. Permission of the District Judge is necessary for alienating by manager the property of the deity. Insecurity of the

27. A.I.R. 2002 S.C. 797.

Right of repurchase.—There was an agreement that the property was to be reconveyed to the vendor within ten years. The vendor subsequently transferred his right of taking back the property to another person, (plaintiff in this case). It was held that the plaintiff had become entitled to repurchase the property under the agreement of re-conveyance. There was nothing to show any restriction upon the right of assignment or transfer. The right of repurchase could not be treated as personal.^{28a}

11. Restriction repugnant to interest, created.—Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

SYNOPSIS

- Restraint on mode of enjoyment.
- Transfer of absolute interest.
- Exception.
- Difference between Sec. 10 and Sec. 11.

RESTRAINT ON MODE OF ENJOYMENT

Section 11, provides that in the transfer of absolute interest of property, if the transferor imposes any condition restraining the mode of its enjoyment, the condition is void and the transferee is not bound by such condition. Absolute interest in a property means ownership. Where a property is transferred absolutely, there is transfer of ownership and the transferee gets all the incidents of ownership including the right to use or enjoy the property as he likes.

A condition attached to the transfer of an absolute interest would affect the full ownership and would make it something less than a full ownership. It is against the very nature of the transfer that ownership is given to the transferee and at the same time his right of enjoyment of the property is either postponed or curtailed.

²⁸ *Shyamal Ranjan Mukherjee v. Nirmal Ranjan Mukherjee*, A.I.R. 2008 NOC 568 (All).

^{28a} *Rajshunath Bali v. Pandit Sritwas*, A.I.R. 2012 Utt. 100.

Transfer of absolute interest.—Section 11 is applicable only where an absolute interest or ownership has been transferred. Where ownership is transferred, the transferee gets ownership right which includes the right of enjoyment of the property as he likes. Sale, exchange or gift is a transfer of ownership or absolute interest. A condition or direction in a sale, exchange or gift that the transferee can or cannot use or enjoy the property in a particular manner is repugnant to the ownership rights and is, therefore, void.

Illustrations

- (i) A sells his agricultural lands to B with a condition that B can cultivate only wheat but cannot grow the crops of paddy. The condition is void and B is free to grow the crops of paddy.
- (ii) A sells a house to B directing B that he cannot reside in it but can use it only as a godown or shop. The condition being void, B is entitled to use the house as his residence.
- (iii) A makes a will of his properties in favour of his two sons B and C jointly with a condition that the property cannot be partitioned till B and C attain the age of majority. Right to effect partition being an incident of joint-ownership on the restraint imposed against this right is void because restriction on the right of partition is regarded as a restraint on the right of enjoyment of the property.²⁹
- (iv) A sold his farm to B with condition that B pays to A Rs. 5000/- per year so long as B is in the enjoyment of the property. The condition is void and B is not bound to pay Rs. 5000/- to A annually.³⁰
- (v) A makes a gift of his house to B with a condition that B shall not receive any income from this house for a period of twenty years. The condition is void as being repugnant to the right of enjoyment.

This section is not applicable where the transfer is merely of partial interest in the property. In the transfer of partial or limited interest, there is no transfer of ownership. For example, lease is a transfer of merely a partial interest in which the lessee gets only the right of enjoyment of the property not its ownership. Condition imposed by a lessor restraining the mode of enjoyment of the property is valid and the lessee is bound by it. Similarly, where A transfers his land to B only for purposes of cultivation of crops for a period of ten years B does not get absolute interest, he gets only a partial interest namely, the right of cultivation. Here, if A imposes a condition that B cannot plant mango-trees on the land, the condition is valid and B is bound by it.

Where a land is transferred 'for life', there is no transfer of absolute interest because in such cases the transferee gets only the right of enjoyment of the property during his life. After his death, the property reverts back to the transferor or his heirs or passes on to any other person as directed by the transferor. Therefore, in a transfer of property for life, the condition or direction

²⁹ See *Ummoo Singh v. Baldeo Singh*, AIR 1933 Lahore 201.

³⁰ See *Litanti v. Firm Ram Diani*, AIR 1971 P & H 87.

limiting the mode of enjoyment is not hit by Section 11 and the condition or direction is valid.

EXCEPTION

The second paragraph of this section is an exception to the rule. It provides that a condition or direction restraining the mode of enjoyment may be made by the transferor provided it is for the beneficial enjoyment of transferor's own he is residing and an adjacent land he can impose a condition on the purchaser open on the side of the land sold. This condition, though curtails the right of enjoyment of the purchaser, is a valid condition because it is meant for the beneficial enjoyment of transferor's own property. This exception is based on the rule laid down in *Tulk v. Moxhay*³¹ where such conditions were described as *restrictive covenants* and are regarded as part of the property for the beneficial conditions of which they are imposed on the transferee.³² Under Section 11 the cases:

- (i) Where the condition has been imposed by the transferor himself; a condition imposed by any other person is not valid.
- (ii) Where the condition restraining mode of enjoyment has been imposed for the beneficial enjoyment of transferor's own property; transferor cannot impose and enforce such restrictive conditions for the benefit of another's property. Since such restrictive covenants exist for the beneficial enjoyment only of transferor's property, they can be enforced only by the transferor or a subsequent assignee from the transferor of the property for the benefit of which the covenant was made.³³

The conditions or directions restraining the mode of enjoyment may be affirmative as well as negative. Where the condition imposed on the transferee's mode of enjoyment is affirmative, the transferee is bound 'to do' certain things even though it may amount to restraint on his mode of enjoyment of the property. In *Indu Kalkar v. Haryana State, I.D.C. Ltd.*,³⁴ there was an agreement between an Industrial Corporation and the Industrial Units with a condition that the Industrial Units should be established 'within specified time', failing which their interest was to cease. The Supreme Court held that the condition was valid and not any restraint on mode of enjoyment. Accordingly, the agreement between the parties was valid and binding on them. Where the condition is negative, the transferee is restrained from doing certain things i.e. he is required 'not to do' certain things.

A donor gifted an entire building in favour of her daughter for life and thereafter to her sons absolutely. By the same gift deed, a conditional right was conferred by the donor on her son to enjoy a portion of the building. It was

31. (1848) 41 E.R. 1143.

32. The rule laid down in *Tulk v. Moxhay* has been incorporated in Section 40 of the Act.

33. *Ledia v. Ambujashy, AIR 1989 Ker. 308.*

34. *A.I.R. 1999 S.C. 296.*

held that the creation of a conditional right simultaneously with creation of title was not violative of Section 11. The section has no application in such a case. The grant was not an encroachment on the absolute right of the daughter's sons.³⁵

Illustrations

- (1) A is owner of two properties, a house and a land adjacent to it. A sells the land to B with a condition that B shall spend money in repairing and maintaining the drain of his house passing through the land sold. B is bound by this condition and A or his assignees are entitled to enforce it against B. Here the restrictive covenant is affirmative in character.
- (ii) A sold certain houses surrounding an open piece of land to B with the condition that B and his heirs shall not make any construction over the piece of land. B and his heirs cannot construct any building over land. Here the restrictive covenant is negative in character.

Difference between Sec. 10 and Sec. 11.—Under Sections 10 and 11 both, the condition subsequent curtailing the rights of a transferee are declared void. But the provisions of these two sections may be distinguished as under—

- (1) Section 10 is applicable to the transfers of absolute interest as well as limited (partial) interest whereas, Section 11 is applied to transfers of only absolute interest (ownership).
- (2) Section 10 refers to a restraint on alienation i.e. under Section 10 the condition is that transferee cannot transfer the property. In Section 11 the restraint is on the mode of enjoyment i.e. under Section 11, the condition is that transferee cannot have the free enjoyment of the property.

12. Condition making interest determinable on insolvency or attempted alienation.—Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

SYNOPSIS

- Insolvency of the transferee.
- Applicability to leases.

Section 12 provides that where a property is transferred subject to a condition or limitation that the interest created thereby is to cease to exist on transferee becoming insolvent or on his attempting to transfer it, the condition is

35. *Subal Chandra Maity v. Usha Banerjee, AIR 2009 Cal 210 (DB); Princy v. Jose, A.I.R. 2010 Ker. 1,*

restriction on building anything on an identified part of the land transferred, valid, binding upon subsequent transferee.

void. This section invalidates two types of conditions : (i) Conditions which limit or restrict any attempted transfer by the transferee and (ii) Conditions which provide that the interest of the transferee shall cease to exist when the transferee become insolvent.

The conditions which restrain any endeavour to transfer, are by way of limiting the ownership rights of the transferee and are, therefore, void also under this section on the same principle as conditions restraining alienations or enjoyment are void under Sections 10 and 11. The object of this provision is to protect the interest of creditors. Although it is unjust to lay down a condition restricting transferee from disposing of his property, it would be equally unjust if such transferee is allowed to defeat the interest of his creditor who had advanced money only on the basis of his property. In the absence of this provision, the transferee may incur debts and is then adjudged insolvent. The result would be that creditor can never recover his money because the property would already cease to be the property of the debtor. Section 12 avoids this situation.

Under Sections 31 and 32 of this Act, a provision has been made that a condition subsequent which lays down that the transferee's interest shall cease to exist upon the happening of an uncertain future event, may validly be imposed by the transferor. Section 12 is an exception to this general rule.

Section 12 is applicable whether the interest transferred is absolute interest or a partial interest. Thus in the transfer or settlement of an interest 'for life' the condition that it shall cease to exist upon transferee becoming an insolvent would be a void condition under this section.

Illustrations

- A settles his properties in trust for his life or until he becomes insolvent and
- (i) upon his death, or
 - (ii) becoming insolvent (i.e. on happening of any of these events) to his wife B. A becomes insolvent. The condition that on A's being bankrupt the interest is to pass on to B, is void. Therefore, upon A's insolvency, the property shall vest in the Official Receiver and not in B.

Insolvency of the transferee.—A person becomes insolvent when he ceases to pay his debts in the usual course of business and is unable to pay them. Such person is formally declared as insolvent under the Insolvency Acts³⁶. Where a person is adjudged insolvent his properties vest in the Official Receiver.

Applicability to leases.—Section 12 is not applicable where the transfer is by way of lease. When a property is leased, there is transfer of only partial interest; there is no transfer of absolute interest. The lessor, being owner of the property retains his *jus disponendi* or the right to dispose of the property. Therefore a lessor while granting the lease may impose any condition on the lessee upon the non-fulfilment of which the lease would be forfeited. Thus if a lessor imposes a condition in the lease that the lease shall be determined (or

terminated) upon lessee becoming insolvent, the condition is valid. However, the condition that lease is to be determined when lessee becomes insolvent may be binding only on the lessee; the assignee of the lessee is not bound by it. Where the lessee assigns the term and thereafter becomes insolvent, the condition shall not apply.³⁷

13. Transfer for benefit of unborn person.—Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration

A transfers property of which he is the owner, to B, in trust for A and his intended wife successively for their lives and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

SYNOPSIS

- No transfer to Unborn Person.
- Transfer for Benefit of Unborn Person : Two Rules.
 - Prior Life-Interest.
 - Only Absolute Interest may be given.
- *Girjesh Dutt v. Data Din.*
- Hindu Law and Muslim Law.
- English Law.

TRANSFER FOR THE BENEFIT OF AN UNBORN PERSON

Transfer to Unborn Person.—There cannot be any direct transfer to an unborn person. An unborn person means a person who is not in existence even in mother's womb. A child in mother's womb or, a child *en ventre sa mère* is a competent transferee. Property can be transferred to a child in mother's womb. But, property cannot be transferred to any person who is not even in the mother's womb because such person is an unborn person. Accordingly, Section 5 of this Act provides that transfer of property takes place only between two living persons. This means that transferee must also be in existence at the date of the transfer. There is a valid reason why property cannot be transferred directly to an unborn person. Legally speaking, every transfer of property involves transfer of interests. When a property is transferred, the transferor divests (or takes out from) himself of that interest and vests it immediately in the transferee. So, if a property is transferred directly to a person who is not in existence, the interest

36. For example, Provincial Insolvency Act, Presidency-Towns Insolvency Act etc.

37. See *Smith v. Groom*, (1891) 2 Q.B. 394, cited in Mulla; TRANSFER OF PROPERTY ACT, ED. VII, p. 103.

so transferred shall be divested or be away from the transferor but it would have to remain in abeyance (void) and wait for the transferee to come into existence, in whom it could vest. Such situation would be against the very concept of the interest. Accordingly, where A makes a gift of his property to the eldest child of B who is unmarried, the gift is void.

Transfer For Benefit of Unborn Person.—Property cannot be transferred directly to an unborn person but property can be transferred for the benefit of an unborn person. Section 13 provides that property can be transferred for the benefit of an unborn person subject to following conditions:

- (i) Transfer for the unborn must be preceded by a life interest in favour of a person in existence at the date of the transfer, and,
- (ii) Only absolute interest may be transferred in favour of the unborn.

I : Prior Life-Interest

The transfer for the benefit of an unborn must be preceded by a life interest in favour of a living person in existence at the date of the transfer. Where a person intends to transfer certain properties for the benefit of an unborn person, such unborn is the ultimate beneficiary. But since such unborn or ultimate beneficiary is not in existence at the date of the transfer, property cannot be given to him directly. There must be a prior life interest in favour of living person so that such living person holds the property during his life and till that time the unborn would come into existence. After the termination of this life interest i.e. after the death of the living person holding property for life, the interest would pass on ultimately to the unborn who, by that time, comes into existence. Thus, in between the transferor and the unborn there must be an intermediary living person who may hold the property in trust for the benefit of the unborn. In this manner successive life interests may be created preceding (or prior to) the interest in favour of the unborn person.

Illustrations

- (i) A transfers his house to X for life and thereafter to U. B who is an unborn son of A. The transfer of house in favour of U. B is valid. Here since U. B is not in existence at the date of the transfer, A could not transfer the house directly to him. So, A had to make a direct transfer of life interest in favour of X who is a living person at the date of the transfer. After the death of X the interest of the house shall pass on to U. B who is the ultimate beneficiary.
- (ii) A transfers his properties to X for life and then to Y for life and then to Z for life and thereafter to the unborn child of Z. Here, X, Y and Z are all living persons in existence at the date of the transfer. This disposition of property is valid. The property may be given to more than one living persons successively 'for life' before it ultimately vests in the unborn (X's unborn child)

II : Only Absolute Interest may be given

Only absolute interest in the property may be transferred in favour of an unborn person. Limited or life interest cannot be given to an unborn person.

Transfer of property for life of an unborn person is void and cannot take effect. Section 13 enacts that interest given to the unborn person must be the whole of the remaining interest of the transferor in the property. When a property is transferred in favour of an unborn, the transferor first gives a life interest to an existing person. After transferring this, he retains with him the 'remaining interest' of the property. This 'remaining interest' with transferor must be given to the unborn so that after the termination of prior life interest, the unborn gets the whole i.e. absolute interest in the property.

In other words, 'whole of remaining interest' is the entire interest of the transferor less prior life interest carved out of the ownership. The transfer in favour of the unborn and (plus) the prior life-interest must exhaust the whole (entire) interest of the transferor in the property which is transferred by him. If there is any other limitation which derogates or cuts short the completeness of the grant in favour of the unborn, the transfer is void. Thus, a life-interest or other limited interest cannot be given to the unborn.

Illustrations

- (i) A transfers his properties to X for life who is unmarried and then to the eldest child of X absolutely. The transfer in favour of eldest child of X is valid.
- (ii) A transfers his properties to X for his life and thereafter to U. B. for life X is a living person at the date of the transfer. U. B. is not in existence at the date of the transfer. Here, the transfer of life-interest in favour of X is valid. But, transfer of life-interest in favour of U. B. is void because although the transfer in favour of U. B. is preceded by a life interest to X but U. B. himself has not been given an absolute interest. The result is, therefore, that X shall hold the property during his life but after his death it shall not pass on to the U. B. but shall revert back to A or (if A is dead by that time) to A's legal heirs.

The above-mentioned two conditions namely, the transfer in favour of an unborn person must be preceded by a life interest and that only absolute interest may be given to the unborn has following legal consequences:

- (a) The intermediary person living at the date of the transfer is to be given only life interest. Giving life interest or creating life-estate in favour of a person means giving him only the right of enjoyment and possession. He has to preserve the property like a trustee during his life-time on behalf of the unborn. If absolute interest is given to this living person, he may be entitled to dispose it of to anyone. If he retains it, the property after his death shall go to his legal heir and not to the unborn for whose ultimate benefit the disposition was made.
- (b) The unborn must come into existence before the death of the person holding property for life. If the unborn comes into existence say, after one month after the death of the last living person (i.e. after termination of the preceding interest), the property is to revert back

to the transferor or his heirs. This is obvious because after termination of the life-interest, it cannot remain in abeyance and cannot wait even for a moment for the next person to come into existence. For example, A transfers property of which he is the owner to B and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and, after his death for A's second son.³⁸ Here, the successive life interests in favour of B and his intended wife is a valid transfer. But, the eldest son of the intended marriage who is unborn, has been given the property only for life and not an absolute interest. Therefore, the transfer in his favour is void and does not take effect.

The donor transferred property by way of gift in favour of his grandson. The property thereafter was to be vested in the male children of the grandson. The Court held that the gift deed could be said to have created life interest in favour of the grandson and absolute interest in favour of his unborn sons. The condition in the gift deed restraining alienation was not void. Alienation of the property by the donee after birth of his sons was improper. The sons were allowed to recover the sale consideration received by their father from the purchasers.^{38a}

Girjeesh Dutt v. Data Din³⁹

The facts were as under. A made a gift of her properties to her nephew's daughter B for life and then absolutely to B's male descendants, if she should have any. But, in the absence of any male child of B, to B's daughter without power of alienation and, if B has no descendants male or female then to her (A's) nephew. B died issueless. The Court held that the gift for life to B was valid as B was a living issueless. The Court held that the gift in favour of B's daughter was void under Section 13 of the Transfer of Property Act because it was a gift of only limited interest (gift without power of alienation); she had not been given absolute interest. Further, since this (prior) transfer was invalid, the subsequent transfer depending on it (i.e. to A's nephew) also failed.⁴⁰

Hindu Law and Muslim Law.—Under pure Hindu law, a gift or bequest in favour of an unborn was void. But now, since Transfer of Property Act is applicable to Hindus, the transfer in favour of an unborn person is valid if it is made subject to the provisions of Section 13 of the Act.

Since Section 2 of the Transfer of Property Act provides that "nothing shall be deemed to affect any rule of Mohammedan law", Section 13 is not applicable to transfers made by Muslims. However, under Muslim law too a gift in favour of a person not in existence has been held void.⁴¹

38. Illustration given in Section 13 of the Transfer of Property Act, 1882.

38a. *Stricker v. N. Kenna*, A.I.R. 2012 Kar. 79.

39. A.I.R. 1934 Oudh 35.

40. See Section 16 of the Transfer of Property Act which provides that if prior interest created under Sec. 13 fails, the subsequent interest depending on it also fails.

41. *Abul Cader v. Turner*, (1884) 9 Bom. 153, Sec. 153; *OUTLINES OF MOHAMMEDAN LAW*, Ed. IV, p. 365.

English Law.—The English law relating to transfer in favour of unborn persons is now governed by the rule against perpetuities as laid down in Section 163 of the Law of Property Act, 1925. Before this Act, the property could be transferred in favour of an unborn subject to "rule against double possibilities."⁴² Under this rule, property could be transferred for life in favour of the first unborn person but to next unborn absolutely. If life estates were granted to two successive unborn persons, the transfer in favour of only second unborn was void because it violated the rule against double possibilities. Thus, under this rule a could transfer properties to U.B1 for life and then to U.B2 absolutely. Now, the transfers in favour of U.B1 and U.B2 (both unborn persons) are valid only if there is no violation of the rule against perpetuity as laid down in Section 163 of the Act of 1925.

14. Rule against perpetuity.—No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

SYNOPSIS

- Rule Against Perpetuity. ✓
- Transfer in Perpetuity. ✓
- Object of the Rule. ✓
- Rule Against Perpetuity under Sec. 14. ✓
 - Maximum remoteness of vesting. ✓
 - Ultimate beneficiary in mother's womb. ✓
 - Contingent interest. ✓
- Exceptions to the Rule Against Perpetuity. ✓
 - Transfer for benefit of public. ✓
 - Personal agreement. ✓
- Rule Against Perpetuity Under Hindu and Muslim Law. ✓
- Difference Between English and Indian Law of perpetuity. ✓

RULE AGAINST PERPETUITY

Transfer in Perpetuity.—Perpetuity means indefinite period. Rule against perpetuity is the rule which is against a transfer making the property inalienable for an indefinite period or for ever. Where a property is transferred in such a way that it becomes non-transferable in future for an indefinite period, perpetuity. In any disposition, perpetuity may arise in two ways: (a) by taking away from the transferee his power of alienation and, (b) by creating future remote interest. Section 10, makes provision that a condition restraining the transferee's power of alienation is void. A disposition which tends to create

42. *Whitby v. Mitchell*, (1890) 4 Ch. D. 85.

future remote interest has been prohibited under Section 14 which incorporates the rule against perpetuity. However, a better name of the rule may be the rule against remoteness of vesting.

Object of Rule Against Perpetuity.—The object of the rule against perpetuity is to ensure free and active circulation of property both for purposes of trade and commerce as well as for the betterment of the property itself. Frequent disposition of property is in the interest of the society and also necessary for its more beneficial enjoyment. A transfer which renders property inalienable for an indefinite period is detrimental to the interests of its owners who are unable to dispose of it even in urgent needs or for any higher value. It is also a loss to society because when property is tied up from one generation to another in one family, the society as such would be deprived of any benefit out of it. Free and frequent disposal ensures wholesome circulation of properties in society. Rule against perpetuity is, therefore, based also on broad principles of public policy. Stating the object of rule against perpetuity, JECYL M.R. in *Stanley v. Leigh*⁴³ has observed that if the rule were otherwise then :

"a great mischief would arise to the public from estates remaining for ever or for a long time inalienable or in transferable from one hand to another, being a damp to industry and a prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered."

In the absence of any rule prohibiting creation of perpetuities, there might come a time when almost all the properties of a country would have become static properties. This would cause great hardship in the easy enforcement of law, detrimental to trade, commerce and intercourse and may also result into the destruction of property itself. The social consequences of creating perpetuity would, therefore, be devastating.

Rule Against Perpetuity Under Section 14

Section 14 of the Transfer of Property Act provides that in a transfer of property, vesting of interest cannot be postponed beyond the life of last preceding interest in the living person (or persons) and the minority of the ultimate beneficiary. The essential elements of the rule against perpetuity as given in this section are as follows :

1. There is a transfer of property
2. The transfer is for the ultimate benefit of an unborn person who is given absolute interest
3. The vesting of interest in favour of ultimate beneficiary is preceded by life or limited interests of living person (s)
4. The ultimate beneficiary must come into existence before the death of the last preceding living person
5. Vesting of interest in favour of ultimate beneficiary may be postponed only up to the life or lives of living persons plus minority of ultimate beneficiary ; but not beyond that

Property may be transferred to any number of persons who are living at the date of transfer. In this way, vesting of interest in favour of ultimate beneficiary may be postponed for any number of years. Thus property may be transferred to A for life then to B for life and then to C for life and so on for several years and all these persons who hold the property successively for their lives would tie up the property for many years before it goes absolutely to the ultimate beneficiary. However, as required under Section 13, such ultimate beneficiary must be born before the termination of the last preceding interest. Accordingly, there should not be any interval between the termination of preceding interest and its consequent vesting in the ultimate beneficiary ; vesting of interest cannot be postponed even for a moment. By way of relaxing this strict rule of Section 13 it is provided in Section 14 that vesting of interest may be postponed but not beyond the life of preceding interest and the minority of the ultimate beneficiary. In other words, Section 14 provides that vesting of interest may be postponed but not beyond a 'certain period.' If in a transfer of property, vesting of interest is postponed beyond this period as prescribed in this section, the transfer would be void as being a transfer for an indefinite period or a transfer in perpetuity. Where property is made to vest within the limit prescribed in this section, the transfer is valid. Any delay beyond this period would make the transfer void. Accordingly, where a property is transferred to A for life and then to U.B. (the unborn) when he attains the age of 19 years, the transfer to U.B. is void under Section 14.

Maximum remoteness of vesting.—Under Section 14, the maximum permissible remoteness of vesting is the life of the last preceding interest plus minority of the ultimate beneficiary. Accordingly, property may be transferred to A for life and then to B for life and then to the U.B. when he attains the age of majority. A and B hold property successively for their lives, therefore, the property is tied up for their lives one after the other. After the death of B (the last preceding interest) although it should vest in the ultimate beneficiary U.B. immediately but, under this section the property may be allowed to vest in the U.B. when he attains the age of majority. Minority in India terminates at the age of eighteen years or, when the minor is under supervision of Court, at the age as twenty one years. But, in *Saundarra Rajan v. Natarajan*⁴⁴ the Privy Council held that since at the date of the transfer it is not known whether or not a *guardian* would be appointed by Court for the minor in future, for purposes of Section 14 the normal period of minority would be eighteen years. So, the vesting may be postponed up to the life of the last person (B) holding property for his life and the minority (18 years) of the ultimate beneficiary.

Ultimate beneficiary in mother's womb.—Where the ultimate beneficiary is in the mother's womb i.e. it is a child *en ventre sa mere*, the latest period up to which vesting may be postponed, (after the preceding interest) is the minority plus the period during which the child remains in mother's womb. It may be noted that minority is counted from the date of worldly birth whereas for purposes of being a transferee, a child in mother's

43. (1732) ALL E.R. 917 at p. 918 : cited in SHAH'S PRINCIPLES OF THE LAW OF TRANSFER, Ed. III, p. 44.

44. AIR 1925 P.C. 244.

womb is a competent person. Where the ultimate beneficiary is in mother's womb when the last person dies, the property vests immediately in him while he is still in mother's womb. Therefore, the exact period from which the minority begins to run is the date when ultimate beneficiary is conceived. Accordingly, the minority up to which the vesting is permitted to be postponed under this section would include the period during which the ultimate beneficiary remains in womb before he is born alive. The period during which a child remains in womb after being conceived is called *gestation*. In India, the maximum possible remoteness of vesting would, therefore, be as under:

Maximum permissible remoteness of vesting = life of the preceding interest + Period of gestation of ultimate beneficiary + Minority of the ultimate beneficiary.

Thus, the maximum limit fixed for postponing the vesting of interest is the life or lives in existence at the date of transfer plus the minority of ultimate beneficiary with the addition of the period of gestation provided gestation actually exists i.e. the ultimate beneficiary is actually in mother's womb at the death of the last person. Where the ultimate beneficiary is already a born person the gestation period cannot be counted in addition to minority. However, in cases where gestation period is to be added, only normal period of gestation (which is about nine months or 280 days) can be allowed to be added in the period of remoteness of vesting of interest.

Illustrations

- (1) A transfers certain properties to X for life and then to Y for life and then to U.B., when he attains the age of majority. X and Y are persons living at the date of the transfer and U.B. is the ultimate beneficiary not in existence even in mother's womb. Here, the last preceding life interest is with Y. When Y dies the U.B. must be already in existence either (i) in mother's womb as a child of say, six months or, (ii) a born child of say, six years. In case (i) the maximum period up to which vesting of property in U.B. can be postponed would be: life of Y + six months (period of gestation) + 18 years. In case (ii) the maximum period upto which vesting may be postponed would be: life of Y + 18 years.

- (11) A fund is bequeathed to A for his life and after his death to B for his life, and after B's death to such of the sons of B as shall first attain the age of 25 years. A and B survive the testator. Here, the son of B who shall first attain the age of 25 years may be a son born after the death of the testator; such son may not attain 25 years until more than 18 years have elapsed from the death of the longer lives of A and B and the vesting of interest may thus be delayed beyond the lives of A and B and the minority of the sons of B. The bequest after B's death is void.⁴⁵

45. Illustration (1) to Sec. 114, Indian Succession Act, 1925. It may be noted that Section 114 of the Indian Succession Act is analogous to Section 14 of the Transfer of Property Act.

Contingent interest.—Under Section 14, vesting of interest in favour of the ultimate beneficiary may be postponed up to his minority. In other words, the property does not vest in him until he attains the age of majority. What then is the nature of his interest during his minority? Between the period when last person dies and the majority of the ultimate beneficiary, the ultimate beneficiary has a contingent interest⁴⁶ which becomes vested upon his attaining majority. Where the ultimate beneficiary is already born at the death of the last person but does not survive to attain majority e.g., dies at the age of fifteen years, the interest does not vest in him and therefore it reverts back to the transferor or his legal heir if the transferor is dead by that time.

Regard of possible events not of actual events—In deciding questions of remoteness of vesting, regard must be had to the possible events and not to actual events.⁴⁷ Where at the time of transfer of property there is possibility or probability that in future it would be a transfer in perpetuity, the disposition shall be void even if at the time of actual vesting of interest there is no violation of rule against perpetuity.

Illustrations

- (1) A makes a gift of his properties to his daughter B for her life and then to her children when they attain the age of 21 years. B has no children at the date of the gift. The gift in favour of B's children is void because the vesting in favour of B's children has not been made within normal period of minority (18 years) but three years later. It may be noted that the maximum period up to which vesting can be postponed after B's death is the minority of B's children who are the ultimate beneficiary. Normally minority terminates at the age of 18 years and only in exceptional cases the minority extends upto 21 years. Thus, at the date of gift the probable remoteness should have been 18 years, instead of 21 years. When the gift was made it was probable that no guardian would be appointed by Court for the children of B. When B died, it was not certain that any of the children would actually have guardians appointed. Accordingly, the gift in favour of B's children is void under this section even if the guardians were actually appointed for them. After B's death, the property would revert back to A or his legal heirs.⁴⁸

- (11) A sold his entire property to B except two *Biglins* of land. In the sale, there was a condition that the two *Biglins* of land would remain in A's possession for life and after A's death in possession of A's lineal descendants. The condition further provided that A or A's lineal

46. In a transfer of property, the interest created in favour of the transferee may either be vested or contingent. Contingent interest depends upon the happening of some specified uncertain future event which may or may not happen. If that event happens, the contingent interest becomes vested. If that event does not happen, the interest fails and it reverts back to the transferor or his legal heirs. For details see Section 21 of the Transfer of Property Act.

47. *Rin Kier v. Rani Nairin*, (1929) A.C. 353; *Nabind Chandra v. Rajini Chandra*, (1921) 25 Cal. W.N. 901; *Kangaram v. Jaghram*, (1906) 29 Mad. 412; *Sundaram v. Jagesh* (1877) 2 Cal. 262.

48. See *Sundaram Rajan v. Natarajan*, A.I.R. 1925 P.C. 244.

descendants had no right to transfer the land and that if none of A's lineal descendant be alive then the property should be the own property of B (the purchaser). A had only one son who was alive on the date of transfer but he died childless.

On similar facts, in *Ram Newaz v. Nankoo*,⁴⁹ it was held by the Court that the transfer of two *Bighas* of land to B was void under Section 14. On actual facts the transfer operated well within the period allowed but, since it was possible that the transfer might have been postponed for 100 or 200 years until A's last lineal descendant, the transfer of the land to B (purchaser) was void.

Exceptions to Rule Against Perpetuity.—The rule against perpetuity is not applicable in the following cases:

(a) *Transfer for the benefit of public.*—Where a property is transferred for the benefit of public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind, the transfer is not void under the rule against perpetuity.⁵⁰ This exemption is necessary because transfers of property for the benefit of public generally are made through the medium of religious or charitable trusts. In the trusts, the property settled is tied up for an indefinite or perpetuity period so that its income may be utilised for ever for the object for which the trust is created. Application of the rule against perpetuity on trusts would render every trust void and it would be impossible to create any trust for the benefit of public.⁵¹

(b) *Personal agreement.*—Personal agreements which do not create any interest in property are exempted from the rule against perpetuity. Rule against perpetuity is applicable only to a transfer of property. If there is no transfer of property i.e. no transfer of interest, the rule cannot be applied. Contracts are personal agreements even though the contracts relate to rights and obligations in some property.⁵² In *Ram Baran v. Ram Mohit*⁵³ the Supreme Court held that a mere contract for sale of an immovable property does not create any interest in immovable property and, therefore, the rule cannot apply to such contracts e.g. it cannot apply to a covenant of pre-emption.⁵⁴ Similarly, where the *Shedhis* of a temple, under an agreement, appointed *pujaris* out of a particular family to perform religious services in the temple, the agreement was valid because the Court held that being a personal agreement, it was not hit by rule against perpetuity.⁵⁵ Rule against perpetuity is not applicable to *mortgages* because in mortgage there is no creation of any future interest. The right of redemption is a present interest in property and a stipulation that it may be redeemed any time

by the mortgagor, does not create any interest in future on which the rule may be applied.⁵⁶ Similarly, an option by a lessee to the lessor to return the lease-hold land in the *Kabuliat* (agreement) is merely a personal covenant and does not create any interest in land. As such, the rule against perpetuity is not applicable to such *Kabuliat*.⁵⁷

The rule against perpetuity is not violated if a *settlement deed* reserves life estate for the executor and his wife with a vested remainder to their unborn children. In *P. Venkata Subanna v. D. Chinna Panayya*⁵⁸ the husband executed a settlement deed under which he created a life estate in favour of his wife so that she may enjoy the property during her life together with husband (the executor) and after his death upto her remaining life and after her death the property was to vest in their children who would be born by that time. The Andhra Pradesh High Court held that the settlement deed was valid and it did not violate the provisions of Section 14. The Court observed that an interest is created in the spouses in *presenti* of its usufruct (benefit) for their personal benefits, the settlement is not void under Section 14.

Rule Against Perpetuity Under Hindu and Muslim Law.—The Transfer of Property Act was made applicable also to Hindus by the Amending Act of 1929. Now, the provisions of this Act including Section 14 are applicable to Hindus. But, even before this amendment, the rule against perpetuity was applicable to transfers made by Hindus by local enactments e.g. Hindu Disposition of Property Act, 1916 and Madras Act 1914. However, apart from these statutory provisions, a transfer of property in perpetuity was held void under Hindu law except gifts for religious or charitable purposes⁵⁹

Although Chapter II of the Transfer of Property Act is not applicable to Muslims but a gift to remote and unborn generations was held void though exception has been made in case of *wakfs*.⁶⁰

Difference Between English and Indian Law of perpetuity.—Under English law, vesting of interest may be postponed upto the life or lives of last person plus a period of 21 years irrespective of the age of minority of ultimate beneficiary. By an amendment, the rule in England has now been modified by Section 163 of the Law of Property Act, 1925 which provides that a transfer shall not be void even if the vesting has been postponed beyond 21 years but it shall take effect as if the age of 21 had been substituted for the age specified in the instrument,⁶¹ (which may be any fixed period longer than 21 years).⁶²

In India, Section 14 provides that vesting can be postponed upto the life or lives of the last person plus the minority of the ultimate beneficiary. Minority

49. (1926) 92 I.C. 401.

50. Section 18, Transfer of Property Act, 1882.

51. The creation of trust involves transfer of ownership to trustees who have no rights of alienation of the property. In 'wakfs' ownership is deemed to be given to God.

52. *Jagat Nath v. Chidi Dholi*, A.I.R. 1973 All. 307.

53. *Jagat Nath v. Chidi Dholi*, A.I.R. 1967 S.C. 744; See also *Shiraj v. Raghuwath*, A.I.R. 1967 S.C. 1917.

54. In *Malabar Baijandir v. Balchand*, A.I.R. 1922 P.C. 165, the Privy Council had held that an agreement (made before T.F. Act) of pre-emption created an equitable estate and is hit by this rule.

55. *Nagar Chandra v. Kailash*, (1921) A.C. 328.

56. *Padmanabha v. Sitarani*, A.I.R. 1928 Mad. 28.

57. *Ganesh Senor v. Purandur Narayan Singh*, A.I.R. 1962 Pat. 201.

58. A.I.R. 1969 A.P. 34.

59. *Sodhmay Chandra v. Mandhatri Dassi*, (1885) 11 Cal. 684; *Vallabhdas v. Gonthandas*, (1890) 14 Bom. 360.

60. *Abul Fata Mohamed v. Rasmuya*, (1894) 22 Cal. 619.

61. See *Mulla, TRANSFER OF PROPERTY ACT*, Ed. VI, p. 110.

62. See *Perpetuities and Accumulation Act*, 1964 (England).

in India terminates at the age of 15 years. After the existing life or lives, vesting cannot be postponed in India beyond 15 years in any circumstance.

15. Transfer to a class, some of whom come under Sections 13 and 14.—If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom, such interest falls by reason of any of the rules contained in Sections 13 and 14, such interest falls in regard to those persons only and not in regard to the whole class.

Property may be transferred for the benefit of a single unborn person or for the benefit of a class of such persons. In both the situations, the transfer must be made according to the provisions of Sections 13 and 14. Where the transfer is for the benefit of a single unborn and falls under any of the above sections then the transferee, who is ultimate beneficiary, gets no property. But, under Section 15 it is provided that where a property is transferred for the benefit of a class of unborn persons and the transfer falls with regard to only some of them under Sections 13 or 14 then the whole transfer is not void. It falls in regard to only those transferees who are unable to take either because of remoteness under Section 13 or because of rule against perpetuity under Section 14. The transfer in regard to other transferees is valid and takes effect.

In *Raj Begum Sahibur Singh v. Thakurin Bhatiraj Kuer*,⁶³ the Supreme Court observed thus:

"It is quite true that no interest could be created in favour of an unborn person, but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest".

Illustrations

(i) A makes a gift of certain properties to B for life and then to B's unborn children with a condition that the first child of B shall get life interest and the rest shall get the property absolutely. Here the ultimate beneficiary is a class of unborn persons at the time of the transfer. As required under Section 13 these unborn persons must get absolute interest. B's first child who is one of his unborn children should also be given absolute interest but B's first child is to get only life interest. Thus, transfer in regard to B's first child falls under Section 13. But, transfer in favour of rest of B's children is valid and takes effect.

(ii) A transfers his properties to B for life and then to X, Y and Z (who are all unborn at the date of transfer) with a condition that X and Y shall get the property when they attain the age of majority but Z shall get when he attains the age of 25 years. The transfer in regard

63. A.L.R. 1953 S.C. 7.

to Z falls under Section 14 but in regard to X and Y the transfer is valid and shall take effect.

Before the Amending Act of 1929, the old section contained English law on this point and the old Section 15 provided that if the transfer for the benefit of a class of unborn persons failed under the rule against perpetuity with regard to any one or two such persons, the transfer failed against the whole class. But, this rule was found to be against the rules of Hindu Law. Therefore, when in 1929 the Transfer of Property Act was made applicable also to Hindus, Section 15 too was amended.

16. Transfer to make effect on failure of prior interest.—Where, by reason of any of the rules contained in Sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

SYNOPSIS

- Prior interest otherwise void.
- Alternative limitations.

Section 16 provides that in a transfer of property if prior (earlier) interest fails under Section 13 or 14, the subsequent interest also fails. This is a commonsense rule and is based on English law that limitations following upon limitations which are void for perpetuity are themselves void whether within perpetuity or not. In any transfer of property, if there are two successive creations of interests one after the other, the later creation of interest would be subject to validity of the prior. This is so because the latter creation of interest is dependent on the earlier one. Accordingly, a valid transfer which is subsequent to and dependent upon void transfer is itself rendered void. For example, A transfers property to B for life then to C for life and then to D absolutely. B is a person living at the date of the transfer but C and D are unborn persons. The transfer of life interest to C (unborn) is void under Section 13, therefore it fails. Since this prior interest fails, the subsequent transfer to D (next unborn) would also fail although D's interest is absolute and is valid under Section 13. In *Girish Dutta v. Data Din*,⁶⁴ A made a gift to her nephew's daughter B for her life and then to B's male descendants absolutely (if she had any). But, if B had no male descendants then to B's daughters without power of alienation; in case B had no descendants male or female, then to her nephew. B died childless. The gift in favour of unborn daughters of B was void. It was a limited interest because it was without power of alienation. The Court held that the gift in favour of B's nephew was void because the prior transfer i.e. transfer in favour of B was void under Section 13.

64. A.L.R. 1934 Oudh 35.

Prior interest otherwise void.—This section is applicable only where the prior interest fails either under Section 13 or 14 but not otherwise. If the prior interest fails under Section 25 (i.e. where the prior transfer is a conditional transfer and the condition precedent is void under Section 25) the subsequent interest would fail but not under Section 16. For example, A transfers his properties to B for life on condition that B commits the murder of X and thereafter the properties shall go to C absolutely. Here, the transfer in favour of C shall fail because its prior transfer is void under Section 25.

Alternative limitations.—Alternative limitations are two independent limitations. They are not limitation upon limitation. The rule embodied in Section 16 is not applicable where there is a limitation only in the alternative of a prior limitation. In a transfer of property where there are two alternative limitations one of which is void for remoteness and the other is capable of taking effect, the Court shall disregard the void limitation and shall give effect to that which is legal⁶⁵. Where a person makes a gift which violates the rule against perpetuity and an alternative independent gift which does not violate the rule against perpetuity, the second gift which does not violate the rule against perpetuity, is valid and becomes operative. In *Jauherbai v. Kablihai*⁶⁶ a property was bequeathed in favour of two persons for their lives and thereafter to the male issue of one of them; failing which he was given power of appointment. In default of male issue the appointment was made in favour of a daughter. It was held that although the bequest (will) to the male issue was void but since the 'power of appointment' was an independent alternative gift, it was valid.

17. Direction for accumulation.—(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(a) the life of the transferor, or

(b) a period of eighteen years from the date of the transfer, such direction shall, save as hereinafter provided, be void to the extent to which the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

65. *Evans v. Chaffin*, 7 H.L.C. 531.

66. I.L.R. 16 Bom. 492.

(ii) the provision of portions for children or remotest issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred, and such direction may be made accordingly.

SYNOPSIS

- Rule Against Accumulation.
- Exceptions.
- Payment of debts.
- Raising portions.
- Preservation of property.

RULE AGAINST ACCUMULATION

A direction for the accumulation of income of any property means restraining the free enjoyment of its incidental benefits such as rents, produce or profits. In other words, direction for accumulation of income would mean limiting the beneficial enjoyment of the property. Condition which restrains the enjoyment of property, which is transferred absolutely, has been declared as void condition under Section 11. Section 17 is an exception to this rule. However, there is a difference between Section 11 and Section 17. Section 11 is applicable only where the property has been transferred 'absolutely'. But Section 17 applies to all kinds of transfers. In a transfer of property direction for the accumulation of its income and profits as a separate fund (so that transferee may not enjoy it) would mean postponing the transferee's right of beneficial enjoyment of that property. Such postponement is discouraged by law just as postponement of vesting of interest has been discouraged under the rule against perpetuities. Under Section 17 direction for the accumulation of income is allowed but not beyond a certain period. The maximum permissible period upto which income of the property may be accumulated is :

(1) life of the transferor, or

(2) a period of eighteen years, whichever is a longer period.

Any direction (condition) which makes accumulation of income beyond this period of maximum permissible postponement is void and inoperative. The result would be that at the end of the last mentioned period (i.e. permissible postponement) the property together with its incidental benefits is to go to the transferee. As regards the accumulation of income upto the aforesaid period, this would be valid and is to operate but accumulation beyond that period, is to be void and is to not take effect. If the accumulation is directed to be for a period longer than the maximum permissible period, it is 'invalid' for the excess over the appropriate period and the income for the excess period as well as the interest on the accumulated fund belongs to the persons, who would have been

entitled if there had been no direction to accumulate.⁶⁷ Direction may be for the accumulation of whole or a part of the income.

Illustrations

- (i) A transfers his properties to B for life with a direction that the income of the said properties shall accumulate during A's life and shall be given also to C. The direction for the accumulation of income is valid, upto the life of B.
- (ii) A transfers a property to B for life and thereafter to B's such son who first attains the age of 25 years with a direction for accumulation of income till B's first son attains 25 years. The direction for the accumulation of income is void.
- (iii) A transfers property to B in 1960 with a direction for the accumulation of its benefits upto 1990. A dies in 1985. Thus the transferor lives for 25 years which is more than 18 years. The direction for accumulation is valid upto 1985 (for 25 years) because it is the longer period.
- (iv) A transfers his house to B in 1960 with a direction for accumulation of its rents upto 1990. A dies in 1970. Here, the transferor lives only for 10 years which is less than 18 years. Therefore, the direction for accumulation is valid upto 1978 i.e. upto 18 years from the date of transfer because it is the longer period.

EXCEPTIONS

There are three exceptions to the rule against accumulation :

(a) *Payment of debts.*—The rule against accumulation embodied in the section is not applicable where the purpose of such accumulation is payment of debts incurred by the transferor or any other person having an interest in the transfer. A makes a gift of his house to B with a direction that from the rents of the house B shall pay Rs. 500-per month towards the satisfaction of a debt of Rs. One lac incurred by A. The direction for accumulation of income is valid even though it continues after the life of A.

(b) *Raising portions.*—Raising portions means providing for a portion (share) of the income for maintenance. Where the direction for accumulation of income is for providing portions for the children or remoter issues of the transferor or any other person interested in the transfer, the accumulation of income may exceed the prescribed period. 'Portion' ordinarily means a part or share which points to the arising of something out of something less for the benefit of some children or class of children.⁶⁸

(c) *Preservation of property.*—Income of the property may be directed to accumulate for the maintenance or preservation of the property transferred.

Such accumulation shall not be void even if it exceeds the life of the transferor or eighteen years from the date of transfer.

18. *Transfer in perpetuity for benefit of public.*—The restrictions in Sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other subject beneficial to mankind.

Section 18 incorporates a general exception to the rule against perpetuity and accumulation. Rule against remoteness or perpetuity and the rule against accumulation of income prevent the properties from being tied up for an indefinite duration. Making property non-transferable or putting restrictions on its transferability is against the socio-economic policy and also detrimental to property itself. But in cases of creation of trusts for religious or charitable purposes, the social interest is in the preservation of the property for indefinite duration so that it remains intact and the religious or charitable objects continue to be fulfilled for ever. This section provides that where a property is transferred for the benefit of the public in advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind, the rules under Sections 14, 16 and 17 shall not apply. The objects enumerated here are charitable objects and transfer for the benefit of public means transfer made for society at large. Such transfers are made through the medium of religious or charitable trusts. Although the word 'charitable' does not occur in this section but the objects given here are the same which are described in Section 92 of the Civil Procedure Code, 1908 as charitable purposes for the creation of trusts. Accordingly, a trust for religious or charitable purposes is recognised in this section as entitled to be exempted from the rule against perpetuity or rule against accumulation.

19. *Vested interest.*—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

67. *Re Walpole, Public Trustee v. Cantelbury*, (1933) All E.R. 362 (H.L.).

68. *Lord Cranworth in Edwards v. Tuck*, 37 Digest 142.

SYNOPSIS

[5.19

- Vested Interests.
- Explanation.
 - Postponement of enjoyment.
 - Prior interest.
 - Direction for accumulation of income.
 - Conditional limitation.
- Nature of Vested Interest.
 - Present fixed right.
 - Transferable and heritable interest.
- Time of vesting of interest.
- Illustrations of Vested Interest.

VESTED INTERESTS

A transfer of property, involves transfer of interests. From the point of view of the quantum (quantity) the interest may be either absolute or partial. From the point of view of the time of accruing (*i.e.*, when transferee gets the interest) the interest may either be vested or contingent. Where the interest transferred is vested, the transferee gets that interest immediately. In other words, as soon as the transfer is complete, the interest accrues to the transferee with immediate effect and the transferee's title is complete. Where the interest is contingent, the transferee gets the interest only upon the happening of an uncertain future event specified in the transfer. In a transfer of property if the interest transferred is contingent the title of the transferee is not complete unless the specified event happens. Section 19 defines vested interest and Section 21 defines contingent interest.

The interest created in favour of the transferee is said to be vested where—

- (a) no time has been specified as to when it is to take effect, or
- (b) it is specified that it shall take effect immediately, or
- (c) it is to take effect upon the happening of an event which must happen.

Normally, when a property is transferred, the transferor simply effects it according to procedure prescribed for the same. He may not mention the date as to when the interest shall pass on to transferee. In such cases, the intention of the transferor is that the transferee shall get the interest forthwith. Such intention is presumed by law if the transferor does not specify as to when the interest shall accrue to transferee. On the other hand, in order to be more specific, the transferor may express his intention that interest shall accrue to transferee with immediate effect. In both the cases the interest transferred is a vested interest. Where the transferor provides that the transfer shall take effect upon the happening of an event of 'must' nature which is bound to occur in future, the interest of the transferee is a vested interest. For example, any future date or year, any particular age of the transferee or, death of any person are future events of 'must' nature. Where transfer of property is to take effect upon the death of a person, the interest accrues to the transferee immediately. It

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may be noted that death is as certain as birth, therefore, where it is provided that the property is transferred upon the death of a person the interest of the transferee is vested because although death is a future event, it is certain. There is no certainty as to when a person dies or whether or not a person survives upto a particular age or year but, his death, as such, is certain. Similarly, any future date or future year is also an event of 'must' nature because they are bound to occur. Thus, in 1993, if a person makes a gift for his property to take effect in 1995, the donee gets a vested interest because after 1993 the year 1995 is bound to come.

Illustrations

- (i) A makes a gift of his house to B. He simply executes the gift deed but does not specify any date on which the ownership is to be transferred. The interest of B is a vested interest.
- (ii) A makes a gift of Rs. 10,000/- to B on the death of C. B has a vested interest in Rs. 10,000/- even before C dies. But the money shall be paid to B only upon C's death. If B dies before the death of C the money shall be paid to B's legal heirs.

Explanation.—Explanation to Section 19 makes it clear that vested interest is not affected by the fact that right of enjoyment has been postponed. The vested interest remains unaffected also when the title is to pass on to another person on the happening of a particular event in future. The explanation provides that in the following situations, although it may appear that the transferee has no vested interest, nevertheless the interest is vested:

(1) **Postponement of enjoyment.**—Postponement of the enjoyment of property does not mean that the interest of the transferee is not vested. In a transfer of property, the primary thing is the transfer of interest of title. Possession of the property is secondary. Therefore, from the fact that right of enjoyment has been postponed, it cannot be inferred that vested interest has not been given. Possession or enjoyment of property, being secondary, it may be postponed for sometime. Where A transfers his properties to B to be given to B on B's attaining the age of majority, the interest of B is vested although he is to get the possession and enjoyment of property only on attaining the age of majority. As soon as he attains the age of majority, he is to get possession and enjoyment. However, if B dies before attaining the age of majority, the possession and enjoyment of the property shall go to B's representatives or legal heirs together with title which B already had and died having it. The postponement of enjoyment of property, therefore, does not prevent the vesting of interest in favour of the transferee. On the contrary, a condition which postpones the enjoyment (beyond the age of majority) is itself void after the transferee has attained majority.⁶⁹ The enjoyment of the property may be postponed till any future date or a future event which is of 'must' nature and is bound to happen. In *Lachman v. Baldeo*,⁷⁰ A made a gift of his property to B

69. *Secadgool v. Official Trustee*, A.I.R. 1931 Cal 651.

70. (1919) 21 O.C. 312 : 48 I.C. 396.

and directed that B was to take possession of a portion of the property only after the death of A and A's wife. It was held that the interest of B was a vested interest.

(2) *Prior interest*.—Where a prior interest is created in the same transfer, there is postponement of the enjoyment of property. The vesting of interest is not postponed. Where A transfers property to B for life and then to C the interest of C is a vested interest. It may be noted that here, C has a vested interest immediately when the transfer was made but his right of enjoyment is postponed till the life of B. B's death is a future event of 'must' nature. Accordingly, although a prior life interest intervenes yet, C gets immediate vested interest.

(3) *Direction for accumulation of income*.—Direction for accumulation of income is valid provided it is within the period prescribed in Section 17 of the Act. Where a property is transferred with such direction, the interest of the transferee is nevertheless vested. In such cases too it is only the right of enjoyment which is postponed; vesting is not postponed. However, when in a transfer of property, if the direction is that right of enjoyment is to terminate only on the death of the transferor, the transfer does not create a vested interest. In *Kokilambal v. N. Ramani Kokilambal*,⁷¹ there was a deed of family settlement in which the settlor created a limited interest (right to receive the income from rents). The property of the settlor was to vest in the settlee (brothers of the settlor) only on death of settlor. The Supreme Court held that the family settlement did not create a vested interest in favour of the settlee (i.e. brothers of the settlor) and settlee could not be absolute owner during the life of settlor. Therefore, the settlee (the brothers of settlor) could not succeed the property on the settlor's death.

(4) *Conditional limitation*.—A condition that upon the happening of a particular event the interest vested in a person shall pass on to another person is called a 'conditional limitation' under English law. In India, this provision is contained in Section 28 of the Transfer of Property Act. In a transfer of property, a conditional limitation does not prevent the vesting of the interest. Rather, it is implied that the interest which had already been vested may be divested and may vest somewhere else. For example, A transfers his house to B with a condition that if B does not take possession of this house within six months from the date of the transfer, the house shall belong to C. The interest of B is a vested interest although it is likely to be divested in case B does not fulfil the condition within six months.

Nature of Vested Interest

(a) *Present fixed right*.—Vested interest is a present fixed right to property. In a transfer of property where a vested interest is created in favour of the transferee, the transferee gets a present fixed right to property. On the other hand, where the interest created is contingent the transferee gets merely a future possible right in property. Contingent interest may or may not become vested in future depending upon the happening or not happening of future event.

But where the interest is vested, it accrues to the transferee immediately. In a vested interest the title of the transferee is complete as soon as the transfer is completed.

An interest may be 'vested in possession' or 'vested not in possession'. Where the interest is 'vested not in possession', there is a present indefeasible right to future possession in which case the transferee gets the possession or enjoyment not immediately but in future. Thus, a vested interest confers a present right to property even though the right of enjoyment is postponed or suspended.

(b) *Transferable and heritable interest*.—Vested interest is transferable and heritable. Being a present fixed right and also since the title of the transferee is complete, a vested interest is divisible and transferable interest.⁷² A vested interest is such a present fixed right of the transferee that it is regarded as his property. It is transferable interest within the meaning of Section 6 of the Act even though the transferee has no possession or right of enjoyment. Further, a vested interest can also be attached and brought to sale in execution of a decree.⁷³

A vested interest is a heritable interest. Where a person (transferee) dies having vested interest in a property, his interest vests in his legal heirs whether or not he has obtained possession.

Heritability of the interest is a 'test' for ascertaining whether the interest is contingent or vested. In a transfer of property, if it is found that the interest of the transferee is heritable, the interest is undoubtedly vested. But, where it is found that interest is not heritable, the interest is a contingent interest. In *Rajes Kanha Roy v. Shanti Devi*,⁷⁴ is an interesting case on this point. Ramani Kanha Roy executed a trust-deed. The deed provided that the trust existed for the payment of debts incurred by settlor (Ramani Kanha Roy). After termination of the trust, the property was to belong absolutely to settlor's two sons. The trust was to terminate (1) upon the death of the settlor and (2) full payment of all the debts. The deed further provided that if either of the sons died before the payment of all the debts, the heirs of the sons were entitled to get the shares of the sons. The settlor died before total discharge of debts. Question before the Court was: whether the interest of the two sons was vested or contingent? The Supreme Court held that under the trust deed the interest conferred upon the two sons was a vested interest. The Supreme Court observed that the scheme of the trust-deed was that the enjoyment was to be restricted until the debts are discharged. What was postponed was not the vesting of property but the income thereof burdened with certain monthly payments and with the obligation to discharge debts therefrom. The Court further observed that since it was provided in the deed that if either of the two sons died before full payment of debts, his heirs were entitled to get their shares the interest of the sons was a heritable interest. And, since the interest conferred upon the two sons was made heritable, their interest was vested.

⁷² *Eloksese Dasee v. Dirmomazini*, 5 Cal 59.

⁷³ *Lal Bahadur Singh v. Rajendra Narain Singh*, (1934) Oudh 451.

⁷⁴ A.I.R. 1957 S.C. 255.

Time of vesting of interest.—On a transfer of property, ordinarily the interest created in favour of the transferee vests immediately. Section 19 provides that the interest created is vested when no time of its vesting is specified or it is to vest immediately or where though enjoyment is postponed but it is intended to vest with immediate effect. However, the transferor may specify particular time of vesting of the interest. Where the transferor specifies any particular time of vesting this would constitute his contrary intention as contemplated under Section 19 by the words "unless a contrary intention appears". The intention of the transferor is to be gathered from the words used by him in the deed. In construing whether certain words mean to convey vested interest or contingent interest, the words used must be interpreted in their plain ordinary meaning. According to the Supreme Court, "the question is really one of intention to be gathered from a comprehensive view of all the terms of a document and also that a Court has to approach the task of construction, in such cases, with a bias in favour of a vested interest unless the contrary is definite and clear."⁷⁵

However, where words used are "to be paid" or "payable" or "to be given" to the transferee at a certain age, the interest is vested and only enjoyment is postponed. But, where the words used are "when" or "if" or "provided" the transferee attains a certain age, the interest is a contingent interest:

A document created an unequivocal right in favour of 16 persons presently (*in praesenti*). They (the beneficiaries) were to enjoy the property along with the settler during his lifetime. They were to get specified shares after his death. The settler made it clear that he would have no right to cancel the settlement deed or alter its terms. The document also provided that two beneficiaries and, after their death, their legal heirs, were to receive temple honours. There was also the provision that respective shares would be divided after disposal of the property. These two conditions were held as not leading to the inference that the document was a "will". The court said that the document has to be construed as a whole and its substance has to be examined to know whether it is a settlement or "will". Its form and nomenclature is not conclusive.^{75a}

Illustrations of Vested Interest

- (a) A transfers his property to B and C in equal shares to be paid (or to be given) to them on their attaining the age of 18 years and if B and C die under the age of 18 years, the property shall go to D. B and C have vested interest even though their interests are likely to be divested upon the happening of an uncertain future event.
- (b) In a trust deed, the settlor directed that after the death of the tenant for life and after making provision out of the trust fund for the payment of a monthly allowance to the widow for life, the trustee was to hold the rest of the trust-property for the use and benefit of his sons 'to be made over to them' on their attaining the age of 21

years. It was held that the language of the trust-deed suggested that vested interest was conferred to the sons.⁷⁶

- (c) A makes a bequest of whole of his properties to B upon trust to pay certain debts out of the income and then to make over the fund to C. At the death of A the gift to C becomes his vested interest. Here, the provision for the payment of debts simply postpones the enjoyment of such a device confers immediate vested interest, the payment of debts constituting only a charge.⁷⁷

- (d) A husband made settlement on his wife for her life and thereafter the sons born to them were to take the property absolutely. The sons acquired vested remainder (interest).⁷⁸

20. When unborn person acquires vested interest, on transfer for his benefit.—Where, on a transfer of property, an interest therein is created for the benefit of a person then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Sections 13 and 14 deal with transfer for the benefit of an unborn person. This section provides that the interest created in favour of an unborn person becomes vested as soon as that person is born alive. Even where the unborn person is not given possession immediately on his birth, the interest is vested. For example, if A makes a settlement on himself and his intended wife for their joint lives and thereafter on the eldest son of their marriage, the son gets vested interest immediately upon his birth. The fact that he is not entitled to possession till his parents are alive, shall not affect the vesting of interest. The section contemplates the normal situation that a person while he is in mother's womb (and is capable of holding property under Section 5) is born alive. The interest created in favour of an unborn is always contingent subject to his being born alive. Where a person dies in mother's womb and is not born alive this section does not apply.

However, the rule that the interest created in favour of an unborn person vests immediately on his birth, is applicable in the normal situations where no particular time of vesting has been specified by the transferor. Where the transferor expresses a contrary intention, for example, where the interest is made contingent interest, the transferor's intention shall prevail against this rule. Thus, where A transfers property to B for life and then to B's such son from her (B's) intended marriage who first attains the age of 18 years, the interest of the son is contingent.

21. Contingent interest.—Where, on a transfer of property, an interest therein is created in favour of person to take effect only on the happening of a specified uncertain event, or if a specified

⁷⁵ *Rajes Kumar Roy v. Shanti Devi*, AIR 1957 S.C. 255.

^{75a} *P. K. Mohan Ram v. B. N. Ananthachary*, AIR 2010 SC 1725.

⁷⁶ See *Sandhu v. Official Trustee of Bengal*, (1931) Cal. 651.

⁷⁷ *JABMAN ON WILLS*, Ed VIII, p. 137a.

⁷⁸ See *Adinodia v. Farooqui*, (1958) 2 Mad. L.J. 57.

uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

SYNOPSIS

- Contingent Interest.
- Exception.
- Nature of Contingent Interest.
 - Future possible interest.
 - Not heritable.
 - Transferable interest.
- Sale of inchoate contingent interest prior to vesting.
- Difference Between Contingent Interest and Spes-successions.
- Distinction Between Vested and Contingent Interest.
 - When accrues?
 - Nature of the title.
 - Transferee's right in property.
 - Transferability.
 - Attachment & sale in execution of decree.
 - Heritability.
- Illustrations of Contingent Interest.

CONTINGENT INTEREST

Contingency means uncertain future event. In a transfer of property where the vesting of interest depends on any contingency i.e. uncertain future event, the interest is contingent. In a transfer of property where the vesting of estate is dependent upon an event that may or may not happen the interest is contingent.⁷⁹

A contingent interest is an interest which is created to take effect only when (i) some specified uncertain future event happens or (ii) specified uncertain event does not happen. Where the creation of interest is made dependent on the happening or not happening of any uncertain future event, it does not vest in the transferee immediately. It vests only upon the happening or not happening, as the case may be, of that event. For example, where A makes a gift to B provided X survives (i.e. lives upto) the age of 20 years, the interest of B is

contingent. Similarly, where A makes a gift to B provided X does not survive (i.e. dies before) the age of 20 years, here too the interest of B is contingent. In both the examples, the vesting of interest in favour of B depends on an event which is uncertain. In the first, the vesting would take effect on the happening (i.e. survival) of that event whereas in the second, it depends on 'not happening' of that event. The happening or not happening of an uncertain future event is the condition precedent for vesting. Until the condition precedent is fulfilled, the transfer does not take place and the interest of the transferee remains a contingent interest. In other words, contingent interest becomes vested only upon the fulfilment of the condition precedent i.e. upon the happening of the contingency.

Contingency or specified uncertain event may be of two kinds. First, where the happening or not happening of the event depends upon the will and desire of the parties e.g. marriage, payment of a sum of money or execution of a deed etc. For example, A makes a gift to B provided C marries within one year of the transfer. The interest of B until C marries is a contingent interest. Secondly, where specified event does not depend on the will or desire of the parties e.g. death of a person on or before a certain age. Thus, where A makes a transfer of his property to B provided C dies at the age of 40 years, the interest of B is contingent. It may be noted that death of a person is a certain event therefore where property is transferred with a condition precedent of the death of any person, the interest of the transferee is vested. But when and at what age does a person die, is an uncertain future event. Therefore, where a transfer is made with words: *when, provided or, if* a person dies at a given age, or in a specified year or, dies *before or after* the death of another person, the interest of the transferee is contingent.

Exception.—Exception to Section 21 provides that where a transferee is to get the interest at a particular age but is entitled to get absolutely the income of that interest before attaining that age, the interest given to him is a vested interest. It may be noted that where an interest is created in favour of a person on attaining a particular age, his interest is contingent. But, if the transferor gives to the transferee also an absolute right in the income arising out of that interest (property) or, directs that so much of such income as is necessary for his benefit be applied with immediate effect, the interest of the transferee is a vested interest.

Nature of Contingent interest

(a) **Future possible interest.**—Contingent interest is a future possible interest. In a transfer of property where the transferee's interest is contingent, he has only a future possible right in respect of property transferred to him. It is neither a present right nor a certain right. Since the happening or not happening of the event, is uncertain, the interest dependent on it is also uncertain. In a contingent interest, the right of enjoyment is also dependent on some event or condition which may or may not happen or be performed.⁸⁰

⁷⁹ *Chitnu Rasthy v. Pujari Kesamma*, A.I.R. 1954 Hyd. 185.

⁸⁰ *Shashi Kumhar v. Promode Chandra*, (1932) Cal. 600.

(b) *Not heritable*.—A contingent interest is not a heritable interest. Where a person having contingent interest dies (i.e. dies before vesting) his legal heirs do not get anything, not even the contingent interest. After the death of person his legal heirs are entitled to inherit only those properties in which he had a vested interest at the time of his death. In *Rajesh Kanta Roy v. Smt. Shanti Devi*⁸¹ the Supreme Court observed thus :

"In the case a contingent interest, one of the features is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such person do not get the benefit of the gift (*transfer*)."

(c) *Transferable interest*.—Contingent interest is a transferable interest. However, since a contingent interest is itself an uncertain interest in the property and transferor's own title is not perfect, the transferee too gets an imperfect title. If the contingent interest subsequently becomes vested, the transferee's interest also becomes vested. But, if the contingency could not happen the transferee does not get any title in the property. In other words, although a contingent interest is transferable, the transferee's title is subject to the same contingency as it was before the transfer was made.

Sale of inchoate contingent interest prior to vesting.—A father and his son purported to transfer certain property as owners when in fact the father had only life interest in it and the son had an inchoate contingent interest which had not become vested, i.e. an undivided share in the family property which was to vest on his father's death. The sale was held to be in efficacious till partitioning of the property.⁸²

Difference Between Contingent interest and Spes-successionis

Contingent interest and *spes-successionis* both are future possible interests. In both, there is no present fixed right in respect of property and in both the cases there is a possibility or 'chance' that it may become a perfect title in future. But, in a contingent interest the degree of this possibility is lesser as compared to *spes-successionis*. For instance where a property is transferred subject to some specified uncertain future event, there are only two possibilities namely, either the event happens or the event does not happen. But *spes-successionis* or mere chance of heir apparent is dependent on several possibilities e.g. (i) the heir apparent survives the *propositus* (deceased person), (ii) even if he survives, the *propositus* during his life has already transferred the property or, (iii) he has made a will of that property. So, *spes-successionis* has been regarded as a naked or mere future possible interest. Therefore, under Section 6 (a) of this Act, *spes-successionis* is a non-transferable interest. Contingent interest is not 'mere' possible future interest, it is simply uncertain. Therefore, law has allowed the transfer of such interest. Subject to the contingency a contingent interest is a transferable interest. Pointing out the

difference between a contingent interest and *spes-successionis* in *Mu Yail v. Official Assignee*⁸³ the Privy Council made following observation :

"...the contingent interest which the children took was something quite different from a mere possibility of a like nature of an heir apparent succeeding to the estate, or the chance of a relation obtaining a legacy, and also something quite different from a mere right to sue. It is a well ascertained form of property it certainly has been transferred in this country for generations—in respect of which it is quite possible to raise money and disposed of it in any way the beneficiary chooses."

Distinction Between Vested and Contingent Interest

(1) *When accrues ?*.—On a transfer of property, a vested interest accrues immediately to the transferee. A contingent interest does not accrue to the transferee until the specified uncertain event happens or does not happen.

(2) *Nature of title*.—A vested interest confers complete and perfect title. In contingent interest the title is dependent on uncertain future event which may or may not occur ; the title is therefore imperfect. Vested interest is owned absolutely, whereas, contingent interest is owned conditionally.

(3) *Transferee's right in property*.—In a vested interest the transferee has present fixed right in property. In contingent interest the transferee has merely a future possible right in the property. A vested interest confers a present right to property even if the enjoyment is postponed or suspended whereas in a contingent interest all the rights of property, including the enjoyment, are dependent on an event which may or may not occur.

(4) *Transferability*.—Vested and contingent interests both are transferable. But, in a vested interest the transferee gets complete title whereas, in contingent interest the transferee takes an interest which may be defeated by non-fulfilment of condition precedent or non-happening of the event.

(5) *Attachment and sale in execution of decree*.—A vested interest is capable of being attached or sold in execution of a decree whereas, a contingent interest cannot be sold in execution of any decree. A merely contingent or possible interest is not liable to attachment and sale in execution of a decree.⁸⁴

(6) *Heritability*.—A vested interest is property of the transferee, therefore, it may be inherited by his heirs even though he could not obtain possession at the time of his death. A contingent interest confers no title, therefore, it is not heritable.

Illustrations of Contingent Interest

(1) A makes a gift of his property to B when he attains the age of 18 years or, marries under that age with the consent of C with a condition that if B

81. AIR 1957 S.C. 255.

82. *Bay Berry Apartments P. Ltd. v. Shukla*, AIR 2007 SC 226.

83. AIR 1930 P.C. 17.

84. Section 60 (1) (m) Civil Procedure Code, 1908.

neither attains that age nor marries with the consent of C the property shall go to D, B and D both take a contingent interest in the property.

(2) A transfers his farm of Sultanpur Khurd to B if B shall convey his own farm of Sultanpur Buzurg to C. Interest of B in the farm Sultanpur Khurd is contingent. It may become vested if B conveys his farm Sultanpur Buzurg to C.

(3) A bequeaths to B Rs. 500/- when B shall attain the age of 18 years and directs that a certain sum, out of another fund shall be applied for his maintenance until B arrives at that age. The legacy in favour of B is contingent.

But, in this illustration if A directs that the interest of Rs. 500/- or a component part thereof shall be applied for B's benefit until he reaches that age, the legacy in favour of B would be vested under the exception to Section 21.

(4) A deed of settlement gave life-estate to X with remainder to his children not in existence at the time of the settlement. The interest of the children before the death of the holder of life-estate is contingent. The interest of the children would become vested after the death of the holder of life-estate.⁸⁵

22. Transfer to members of a class who attain a particular age.—Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

SYNOPSIS

- Class of contingent transferees.
- Exception to Section 21 not applicable.
- Illustration.

Class of contingent transferees.—This section deals with transfer to a contingent class. Where the transferee constitutes a class but who are to be included in this class is not certain, the transferee is a contingent class. For example, where a transfer is made to such of the children of A who shall attain the age of 18 years, the transfer is in favour of a known class of persons i.e. the children of A. But, it is not certain as to who among the children of A shall survive to attain the age of 18 years. Therefore, the transfer is in favour of an uncertain or contingent class.

Section 22 provides that where an interest is created in favour of only such members of a class who shall attain a given age, such interest does not vest in any member of the class who does not attain that age. In the above example, no child of A who has not attained 18 years may get any interest because until he attains the prescribed age (here 18 years) he is uncertain transferee.

85. *Rukhmambai v. Shivanam*, A.I.R. 1981 S.C. 1881.

However, where the class of transferee is certain and known but vesting of interest in favour of this class is uncertain, this section is not applicable. Thus, where a gift is made to the children of A provided an uncertain event happens, the transfer is to a certain class of transferee but vesting of interest is uncertain or contingent. Section 22 does not apply to such situations.

Exception to Section 21 not applicable.—The exception to Section 21 is applicable only in cases where a property is given to a person on attaining a particular age; it has no relation to any other contingency e.g. on his surviving a specified person etc. Where a person made a will of his property to such of his grandsons as survived him and attained the age of 18 years, and gave also the income of property till they attained the age of 18 years, the Privy Council held that the interest of the grandsons was not vested under the Exception to Section 21.⁸⁶

Illustration

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied to his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.⁸⁷

23. Transfer contingent on happening of specified uncertain event.—Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same times as, the intermediate or precedent interest ceases to exist.

Subsequent Contingent Interest.—The rule enacted in this section is based on the principle that property cannot remain without an owner even for a moment. This section contemplates a transfer of property in which there is creation of a prior interest followed by a subsequent contingent interest. In such transfers, after the termination of prior interest the property is made to vest subsequently in another person upon the happening of an uncertain event. If the subsequent contingency does not happen before termination of the prior interest, the interest would have to remain in abeyance (void). In other words, there would be an interval between termination of the prior interest and its subsequent vesting. Section 23 provides that the contingent interest will fail and cannot vest unless the event occurs before or at the time of termination of prior interest. Thus, where a property is transferred to A for life and then to B provided B gets first division in Law-examinations, B must get first division before the death of A. If B fulfils the condition after say, one month, of the death of A the property cannot vest in him.

86. *Sophia v. Administrator-Gen. of Bengal*, A.I.R. 1944 P.C. 67.

87. Illustration to Section 121, Indian Succession Act, 1925.

In *Official Assignee Madras v. Veluvelu Thiyagarammal*,⁸⁸ a testator bequeathed his properties to his grandson or grandsons who might be born within ten years after his death. It was held that the disposition through this will was void and could not take effect because there would be an interval of ten years after the termination of last interest (death of testator) during which the estate was not vested in any person.

24. Transfer to such of certain persons as survive at some period not specified.—Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration

A transfers property to B for life, and after his death to C and D, equally to be divided between them or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

This section contemplates a transfer in which an interest is created in favour of a contingent class which is to be ascertained at the time of vesting of interest in favour of the transferee or transferees. It is provided that where an estate is limited to two persons jointly subject to a condition that interest therein shall vest in such of certain persons who would be surviving at some period but, the exact period is not specified then, the property shall go to that transferee (or transferees) who shall survive at the time of termination of prior interest. In other words, where property is transferred to certain persons jointly subject to a condition that they survive the termination of a prior interest then, the person who does not survive is to get nothing and the surviving person is to take the whole. For instance, A transfers his property to B for life and then to C and D equally or, to the survivor. C dies during the life of B whereas D survives B. Here, D is to take the whole property after the death of B.

25. Conditional transfer.—An interest created on a transfer of property and dependent upon a condition falls if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

- (b) A gives Rs. 500/- to B on condition that he shall marry A's daughter C. At the date of the transfer, C was dead. The transfer is void.
- (c) A transfers Rs. 500/- to B on condition that he shall murder C. The transfer is void.
- (d) A transfers Rs. 500/- to his niece C if she will desert her husband. The transfer is void.

SYNOPSIS

- Conditional Transfers.
- Condition precedent.
- Condition subsequent.
- Collateral condition.
- Void Condition Precedent.
- Impossible to perform.
- Unlawful.

CONDITIONAL TRANSFERS

Property may be transferred either absolutely or conditionally. Where property is transferred absolutely, it is unconditional transfer and transferee gets the interest without any subject or limitation. On the other hand, when property is transferred conditionally, the transfer is subject to certain conditions or limitations and the legal effect of transfer may vary according to the nature of condition attached to it. A transfer of property with certain condition is called conditional transfer. Conditions are of three kinds : (i) Condition precedent, (ii) Condition subsequent, and (iii) Collateral conditions.

(i) **Condition precedent.**—A condition precedent is that condition which precedes the transfer of property. It is prior to the transfer. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition is a condition precedent. The transfer is, therefore, dependent on the fulfilment of a condition precedent. For example, where A makes a gift of his house to B if B marries C, the condition is a condition precedent. Gift in favour of B shall take effect only if B marries C; if he does not do so, the house cannot be transferred in his favour.

(ii) **Condition subsequent.**—A condition subsequent is that condition which is required to be fulfilled after the transfer of property has already taken place. Therefore, where a condition subsequent has been imposed in a transfer, the interest of the transferee which has already been vested in him is affected by fulfilment or non-fulfilment of that condition. For example, A transfers a farm to B provided that, if B shall not go to England within three years after the date of transfer his interest in the farm shall cease. B does not go to England within the period prescribed. His interest in the farm ceases.

(iii) **Collateral condition.**—A condition is collateral if it is required to be fulfilled simultaneously with the transfer. A collateral condition is required to be performed side by side the operation of the transfer. Thus, where A leases his property to B so long as B resides in the house of A, the condition is collateral. The transfer i.e. the lease remains in operation only till B fulfils the condition, viz. he continues to live with A.

Void Condition Precedent

Section 25 deals with a condition precedent. Under this section, a condition precedent is void if its performance is either impossible or unlawful and, where a condition precedent is void the transfer of property too is void; it fails. In the following cases, the conditions are void and the transfer fails (i.e. it does not take effect) because the conditions cannot be fulfilled:

(a) **Impossible to perform.**—A condition which cannot be practically performed is called impossible condition. Since such condition can never be performed, the transfer of property too can never take place. For example, no human being can walk hundred kilometres an hour. Therefore, where A lets a farm to B on condition that he shall walk a hundred kilometres in an hour, the lease is void. In *Rajendra Lal v. Miralini Dassi*,⁸⁹ the condition in the bequest was that the legatee excavated a tank when the testator himself did it in his life time. This was not practically possible, therefore, the condition was void and bequest failed.

(b) **Unlawful.**—In the following cases the conditions are unlawful and void; the transfer with such conditions fails:

(i) **Forbidden by law.**—If a condition is forbidden by law, it is void. Transfer of property with such condition cannot take place. A transfers his house to B on condition that B shall transfer his ex-cise licence to C. Transfer of licence is forbidden by law and the condition cannot be performed. Transfer of house fails.

(ii) **Defeats the provision of law.**—Where the condition is such that if performed it would defeat the provisions of any existing law, it is void. Transfer with such condition fails. Thus, where A transfers his properties to B (a married Christian whose wife is alive) on condition that B shall marry C, the transfer fails. Fulfilment of this condition would defeat the provision of Christian matrimonial law under which during subsistence of a marriage no second marriage is allowed.

(iii) **Fraudulent.**—A condition the fulfilment of which amounts to 'fraud' is unlawful. For instance, A makes a gift of his house to B, who is agent of C, on condition that B shall give a false receipt on behalf of his principal C. Performance of this condition would be fraudulent, therefore, the condition is unlawful and the gift cannot take effect.

(iv) **Involves any injury to person or property.**—A condition the performance of which is an offence causing injury to person or property of

another person is unlawful and a transfer with such condition fails. A transfers property to B on condition that B kills C (or sets fire to C's house) is void and does not take place.

(v) **Opposed to public policy.**—Where the condition precedent is immoral or opposed to public policy, the transfer with such condition cannot take place because the condition is void. A makes a gift of Rs. 1,000/- to B when B deserts her husband. B can never be entitled to get Rs. 1,000/-.

Excepting one, void conditions precedent as contemplated in this section are the same as given in Section 23 of the Indian Contract Act. Therefore, further illustrations of the nature of conditions which are void on the ground of being unlawful may be seen there.

26. Fulfilment of condition precedent.—Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations

(a) A transfers Rs. 5,000/- to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D, B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000/- to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

PERFORMANCE OF CONDITION PRECEDENT

Where a transfer of property is dependent on the fulfilment of any condition precedent, the vesting of interest cannot take place unless the condition is performed. If condition precedent is void under Section 25 it cannot be performed and the transfer never takes effect. But where the condition is valid and lawful, its performance is necessary for passing of the interest in favour of transferee. Section 26 provides that where transfer is dependent on any (lawful) condition precedent its substantial compliance is sufficient for the transfer. It is not necessary that the condition is fulfilled strictly in accordance with its terms. This section incorporates the rule that a condition precedent is to be interpreted liberally whereas a condition subsequent is to be strictly construed.

By substantial compliance is meant that condition has been carried out for the most part of its terms. For example, A transfers Rs. 5,000/- to B on condition that B shall marry with the consent of C, D and E. E dies and his consent is not

possible. B marries with the consent of C and D. The condition has been carried out in substance though not strictly according to its terms. B gets Rs. 5,000/- if he marries with the consent of only C and D. Similarly, where A makes a gift of Rs. 5,000/- to B on condition that B marries with the consent of C, D and E. B marries with the consent of C and D and takes the consent of E after marriage, this is substantial compliance of condition. Where the condition made is of residence but the manner is not indicated, an occasional residence was held as substantial compliance.⁹⁰ However, where a property is transferred to A if he executes a deed within a specified time and the document was executed within reasonable time but not within the time specified, it was held that condition was not performed.⁹¹

27. Conditional transfer to one person coupled with transfer to another on failure of prior disposition.—Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

- (a) A transfers Rs. 500/- to B on condition that he shall execute a certain lease within 3 months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.
- (b) A transfers property to his wife; but, in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

SECOND TRANSFER ON FAILURE OF FIRST

This section contemplates a situation in which a second transfer takes effect on failure of prior valid transfer. It is provided that if two interests are created in the same transaction then upon the failure of the first interest the subsequent

interest takes effect even though failure of the first was not in a manner intended by the transferor. However, the failure as contemplated in this section is failure of prior interest *e.g.* by death of the first transferee of a valid transfer, not failure of the transfer which is void *ab initio*.⁹² For example, A transfers Rs. 500/- to B on condition that he shall execute a certain lease within three months, after A's death and if he neglects to do so, to C. B dies in the life time of A. Here, since the prior interest (*i.e.* to B) is a valid transfer but it fails because B dies during the life of A making it impossible for him to execute lease as required. The disposition in favour of C shall take effect.

Exceptions.—Paragraph 2 of this section lays down two exceptions to the rule given above. First, where the prior interest is void, the second (ulterior) interest dependent on it also fails and cannot be carried out under this section. For instance, A transfers properties to B on condition that B commits murder of C, and thereafter to D. The prior transfer from A to B because of void condition, is bound to fail. The second transfer *i.e.* to D would also fail. Secondly, where the intention of the transferor is clear and specific that the second transfer would take effect if prior transfer fails in a particular manner, the second transfer cannot take place unless the prior transfer fails in that way. For instance, A transfers certain properties to his wife; but in case she should die in his life time, transfers the same properties to B. A and his wife die together in the same plane-crash which makes it impossible to prove that she died in A's life time. The transfer in favour of B does not take effect because the prior interest did not fail as provided specifically.⁹³

28. Ulterior transfer conditional on happening or not happening of specified event.—On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen, such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In such case the dispositions are subject to the rules contained in Sections 10, 12, 21, 22, 23, 24, 25 and 27.

SYNOPSIS

- Conditional Limitation.
- Exceptions of Sec. 28 : Illustrations.

CONDITIONAL LIMITATION

A conditional limitation is a condition which divests an interest and vests it subsequently in another person. Ulterior dispositions which take place upon the failure of a prior transfer, are effected by conditional limitations. Section

⁹⁰ *Considino Mohan Tagore v. Rajah Johnnra Mohan Tagore*, (1874) 1 L.A. 387.

⁹¹ *Verlindia v. Chitranjil*, (1905) 25 Mad. 173.

⁹² *Small Haji Amal v. Umar Abdulla*, (1942) Bom. 135.

⁹³ *Underwood v. Wigg*, (1855) 4 De. G.M.C. 633 : However, now the law in England is that when two persons die together the younger is presumed to survive the elder. In India there is no such presumption.

28 provides that in a transfer of property, interest may be created in favour of a person with a condition that if an uncertain event does not happen the interest shall pass on to another person. Thus, a conditional limitation is a condition of defeasance, which terminates the interest of one person and invests another person with it.⁹⁴ For example, A transfers Rs. 10,000/- to B with a condition that B goes to England within three years and in case B does not do so the money is to go to C. Here, the transfer of money (Rs. 10,000) to C is an ulterior transfer and it takes effect in case the prior transfer viz. from A to B fails. Therefore, if A goes to England within three years the money cannot go to C but if B does not go to England within three years it shall pass on to C. It may be noted that for prior transfer the condition is a condition subsequent whereas for the ulterior transfer it is a condition precedent.

Conditional limitations as contemplated under this section are, however, subject to the rules contained in Sections 10, 12, 22, 23, 24, 25 and 27 of this Act. That is to say, the validity of conditional limitation depends on the above-mentioned sections. This may be explained through following illustration:

(1) Section 10.—A transfers his house to B without power of alienation and in case B dies childless, to C without power of alienation. In both the cases the restriction is void under Section 10.

(2) Section 12.—A transfers his house to B and upon B becoming insolvent to C, B becomes insolvent. But the house does not vest in C; it vests in the Official Receiver.

(3) Section 21.—A transfers property to B and in case B dies without any issue to C, C has a contingent interest which may become vested only upon B dying childless.

(4) Section 22.—A transfers property to B and after B's death to such of the children of C as shall attain the age of 18 years. All children of C living at the time of B's death have an interest which may vest in them when they attain the age of 18 years.

(5) Section 23.—A transfers his field to B for life and thereafter to C if C goes to London. C does not go to London until a year after B's death. The interest of C fails.

(6) Section 24.—A transfers his field to B and after B's death without children to the sons of C or the survivor of them. C's sons who survive B take the field.

(7) Section 25.—A makes a gift of his house to B on condition the B commits the murder of C with a proviso that on B's death without issue, the field shall belong to D. The interests of B and D both fail.

94. "A conditional limitation is one containing a condition divests an estate that has vested and vests it in another person. As regards the prior interest, it is a condition subsequent but as regards the ulterior interest, it is a condition precedent." *Muliyil, TRANSFER OF PROPERTY ACT Ed IX p. 232.*

29. Fulfilment of condition subsequent.—An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration

A transfers Rs. 500/- to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500/- shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

SYNOPSIS

- Performance of Condition Subsequent.
- Illustrations.

PERFORMANCE OF CONDITION SUBSEQUENT

As a general rule, law disfavours divesting of interest. Therefore a condition subsequent which operates to divest an interest is to be performed strictly. Accordingly, a condition precedent is deemed to be fulfilled if it is substantially performed whereas a condition subsequent must be performed strictly. This section provides that a condition subsequent upon the fulfilment of which the second (or ulterior) transfer is to take place, must be strictly fulfilled. For example, A transfers a garden to B with a condition that if B cuts down a particular tree, the garden shall belong to C. B has a vested interest in the garden. If B cuts down several other trees around that specified tree, his interest is not divested. But as soon as he cuts down that particular tree, his interest in the garden is divested and it shall now belong to C. Since an already vested interest is divested or taken away by such condition, the words of a condition subsequent must be clear and must also be fulfilled clearly.⁹⁵ Where the ulterior transfer is dependent on two or more conditions, all the conditions are required to be fulfilled strictly.

Ignorance, illness or neglect cannot be taken as a plea for non-compliance of a condition subsequent. It cannot be pleaded by a person who takes under a deed that he was not aware of the condition laid down for ulterior transfer. Where there would be non-fulfilment and the interest would vest.⁹⁶

Illustrations

- (1) A transfers Rs. 500/- to B to be paid to him on his attaining majority or marrying, with a proviso that if B dies a minor or marries without the consent of C, the said sum of Rs. 500/- shall go to D. B takes vested interest in the money from the date of the transfer but his right of enjoyment is postponed till any one of the conditions mentioned above is fulfilled. If B marries without the consent of C at the age of 17 years, he is divested of his interest in Rs. 500/- and the transfer to D takes effect.

95. *Gonidraju v. Mangalam Pillai*, AIR 1933 Mad. 80; See also *Yaacob Yohannan v. Rebecca Maria*, AIR 1973 Ker. 96.

96. *Timour Dase v. Krishna*, (1893) 20 Cal. 15.

- (2) A makes a gift to B with a proviso that if B marries without the consent of C, D and E, the property shall go to X. Before the marriage of B, E dies. B marries without the consent of C and D. Property shall not go to X because the condition subsequent which divests the interest of B and vests it into X has not been performed strictly.
- (3) A property is transferred to A with a condition that if he marries without the consent of B the property shall belong to C. A marries another woman without the consent of B. Transfer to C does not take effect because the condition once fulfilled is discharged.
- 30. Prior disposition not affected by invalidity of ulterior disposition.**—If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration

A transfers a farm to B for her life, and, if she does not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

SYNOPSIS

- Invalid Subsequent Disposition.
- Illustrations.

INVALID SUBSEQUENT DISPOSITION

In a transfer of property where two interests are created in such a manner that the second is dependent on the first then, if first or the prior interest fails the second automatically fails. But the *vice versa* is not true. This section provides that if the ulterior or the second disposition is invalid and fails, the prior transfer is not affected and stands valid. In other words, prior dispositions if valid are to be made effective but the ulterior or subsequent dispositions if invalid are to be ignored. Under this section, the ulterior limitation may fail on any ground of invalidity mentioned in the preceding sections leaving the prior limitation unaffected.

Illustrations

- (1) A field is transferred to A for life with a proviso that if he shall not walk 100 kilometres per hour on a particular date the field shall go to B. The transfer of field to A for life is valid and will remain with him. After A's death field shall not go to B because it is superadded with a void condition.
- (2) A gift is made to A with a condition that if within one year of the gift A does not set fire to B's house the house shall be given to C. B's gift is absolute as if no condition subsequent has been attached.

31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.—Subject to the provisions of Section 12, on a transfer of property an interest there may be created with the condition superadded that it shall

cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations

- (a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.
- (b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

SYNOPSIS

- Condition Subsequent.
- Illustrations.

CONDITION SUBSEQUENT

This section deals with a condition subsequent which terminates an interest. After termination the interest reverts back to the transferor. Difference between a condition subsequent under this section and a conditional limitation is that both are conditions subsequent and both terminate an interest but in a condition subsequent (S. 31) the interest reverts back to the grantor whereas in a conditional limitation (S. 28) the interest so terminated passes on to a third person.

The condition subsequent which operates to terminate the interest must be valid condition. If the condition is void, it does not terminate the interest. Thus, where the condition is that the interest created in the transfer of property shall cease to exist upon transferee becoming insolvent, the condition is void and the interest of the transferee shall not be terminated. Further, since the condition under this section terminates an existing interest upon the happening or non-happening of an event, the event must be definite and specific. Where a lease-deed provided that the lease shall stand cancelled when lessee takes upon "any other business or manufacture of any other kind" without the written consent of the landlord, it was held that the condition was very vague and the transferee was not bound by it.⁹⁷

Illustrations

- (1) A transfers a farm to B for his life, with a proviso that in case B cuts down a certain wood the transfer shall cease to have any effect. B cuts down the wood. The life-interest of B terminates and reverts back to A as soon as B cuts down the wood.
- (2) A who is under sentence of transportation for life and transfers his field to B with a proviso that in case A returns from Port Blair the

⁹⁷ *Krishna Chandra v. National Chemical and Salt Works*, AIR 1937 Orissa 35.

interest of B shall cease. A returns from Port Blair. B's interest in the field ceases.⁹⁸

- (3) A transfers his house to B with a proviso that if B becomes insolvent, the interest of B shall cease. B is adjudged insolvent. The field vests in the Official Receiver or the Official Assignee but does not return back to A.

32. Such condition must not be invalid.—In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

VOID CONDITION SUBSEQUENT

As discussed in the preceding section, a condition subsequent may terminate the interest of the transferee. But, it is necessary that such condition must be valid. Where a condition subsequent providing for termination of interest is itself void, it shall not be effective and the interest is not to cease. This section provides that a void condition subsequent does not divest the interest. The situations under which a condition precedent is rendered void under Section 25 make also a condition subsequent void under this section. For instance, where A transfers his field to B with a proviso that if B does not set fire to C's haystack within a year his (B's) interest shall cease, the condition being void shall not operate to divest the interest of B. Similarly, where A gives Rs. 1000/- to B on condition that if B does not desert her husband within one year her interest in the said money shall cease, the condition being void cannot operate to divest B's interest in the money. However, a condition subsequent requiring that transferee shall not become a Christian has been held a valid condition.⁹⁹

33. Transfer conditional on performance of act, no time being specified for performance.—Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

SYNOPSIS

- No Time for Performance of Condition Subsequent.
- Illustrations.

⁹⁸ *Venkannamma v. Aiyasami*, A.L.R. 1923 Mad. 67.

⁹⁹ *Hodgson v. Holford*, (1879) 11 Ch. D. 959.

No Time for Performance of Condition Subsequent

A transfer of property in which interest created therein is dependent on a condition subsequent, performance or non-performance of that condition is important. Where some specific event or a particular time has been fixed for the performance of that condition, it must be performed within that time or upon happening of that very event. However, there might be cases in which a transfer is subject to a condition subsequent but no time has been fixed for performance of the same. This section provides that when no time for the performance of a condition subsequent has been fixed, it becomes broken not only when the performance of that condition becomes impossible but also when that person does something by which its performance is indefinitely postponed.

Illustrations

- (1) A gift is made to A on condition that unless he joins army the gift shall go to B. A joins Church and thereby renders it impossible that he may join army and fulfil the condition. B is entitled to get the property.
- (2) A bequest (will) is made to A with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.¹

34. Transfer conditional on performance of act, time being specified.—Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him or a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefitted by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

TIME SPECIFIED FOR PERFORMANCE OF CONDITION.

This section is applicable to condition precedent as well as condition subsequent. Where a time has been specified for the performance of a condition, the condition must be fulfilled within that time. Section 34 provides that if a

1. Illustration (ii) to Section 136, Indian Succession Act, 1925.

condition is to be performed within a given time and the performance of the condition is prevented by a person interested in its non-performance by *fraud*, the time for its performance becomes extended. In other words, where time is relevant for fulfilment of a condition but some delay is caused in its fulfilment due to fraudulent act of a person interested in causing delay, then the delay so caused is exempted and the condition is deemed to have been fulfilled within time. This provision prevents a person to take advantage of his own fraud.

Where no time is specified for the performance of the condition but a person interested in its non-performance makes the performance impossible by his fraudulent act then too the condition is deemed to have been fulfilled. For example, a property is transferred to A with a condition that if A does not live at a holy place for three months from the date of transfer he shall be divested of his interest in the property. Some of A's relatives by fraudulent means confined A at a particular place so that A may not live at the said holy place. A, therefore, could not fulfil the condition. It was held that since non-performance of condition by A was caused by A's relatives in anticipation that in A's absence property shall go to them under Section 34, the condition is deemed to have been discharged.²

35. Election when necessary.—Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of.

Subject nevertheless,

Where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustration

The farm of Sulampur is the property of C and worth Rs. 800/-. A by an instrument of gift professes to transfer it to B giving by the same instrument Rs. 1,000/- to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000/-.

In the same case, A dies before the election. His representative must, out of the Rs. 1,000/- pay Rs. 800/- to B.

² *Tin Canuri Dossare v. Krishna*, (1893) 20 Cal. 15.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred on him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not, within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

SYNOPSIS

- Doctrine of Election : Based on principles of Equity.
- Essential Conditions.
 - Transferor Professes to Transfer Property Not his Own.
 - Benefit Conferred on the Owner of Property.
 - Part of the Same Transaction.
- Owner's Duty to Elect.
- Mode of Election.
- Implied Election.
- Requisition to Elect.
- Suspension of Election.
- Where election is against transfer.
- Rights of Disappointed Transferee.
- Illustration.
- English Law.

DOCTRINE OF ELECTION

Section 35 incorporates the doctrine of election. Election means choosing between two inconsistent or alternative rights. Under any instrument if two rights are conferred on a person in such a manner that one right is in lieu of the other, he is bound to elect (choose) only one of them. *A person cannot take under and against the same instrument.*³ Thus, where some money is gifted to A and in lieu of it A is required to transfer his house to B then A would not be allowed to retain his house and also take the gift. He cannot enjoy both. A will have to choose (i) either taking of the gift in which case he must relinquish the benefit of gift. In the language of law, A shall be *put to election*. The doctrine of election is based on equitable principle under which a person may not be allowed to approve that part of an instrument which is beneficial to him and disapprove its that part which goes against him. *No one can approve and reprobate at the same time.* In other words, where a person takes some benefit under a deed or instrument, he must also bear its burden.⁴

The doctrine of election which is based on equity is applied to every species of instrument whether deed or will and to every kind of property movable or immovable.⁵ The equitable principle of election has aptly been stated thus—

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in case where

3. *Begpalumma v. S.V. Kadambalilaya*, AIR 1965 S.C. 241.

4. *Codrington v. Lindsay*, (1873) 8 Ch. 578. Refer : Mulla; TRANSFER OF PROPERTY ACT, Ed. IX p. 247.

5. *Cooper v. Cooper*, (1874) 7 H.L. 53. *Ibid*.

there is clear intentionthat he should not enjoy both. That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."⁶

Section 35 of the Act makes following provisions in respect of the rule of election :

- (i) Where a person professes to transfer a property not his own,
- (ii) and, in lieu of this transfer the transferor confers certain benefits upon the owner of the property and,
- (iii) the two things, i.e., transfer of property and conferring of the benefit forms part of the same instrument.

Then, the owner of property is bound to elect (choose) either to take the benefit and transfer his property or to retain his property and give up the benefit.

Transferor Professes to Transfer Property Not His Own.—Section 35 applies where a person professes to transfer the property of another person. 'Professes' means purports or makes contract. Since such person is not the owner, he cannot transfer that property. But, he can contract or make arrangement for a transfer of that property. He can contract or make arrangement for transfer of a property which he does not own.⁷ For example, A may profess to transfer a property to B which is owned by C and also confer on C a benefit of Rs. 1000/-. In this contract A is not transferring C's property, he is simply professing (contracting) to transfer a property which he does not own. Therefore, A is not transferor. But, for the sake of convenience, hereinafter A may be called as a 'transferor'. However, it is not necessary that transferor should mention it in specific words that he is professing to transfer a property not his own. This is inferred by the Court from the facts of a particular case and from the language used in the instrument.

Knowledge of the fact that transferor has no authority to transfer the property is immaterial for applicability of the rule of election. Second paragraph of this section makes it clear that the rule applies whether the transferor does or does not believe that the property which he is professing to transfer is not his own. The transferor may have misunderstood or forgotten about his rights in the property or may profess to transfer it due to any other reason.

Benefit Conferred on the Owner of Property.—The transferor must confer any benefit on the owner of property. The word 'owner' in this section has a very wide meaning. It includes a person having vested interest as well as contingent interest and also a person who has even reversionary or remote

6. White and Tudor's LEADING CASES IN EQUITY, Vol I Ed. VIII, p. 444.

7. Why a person professes to transfer a property which he does not own, is an apt question. He may do so either because of his ignorance or misunderstanding about his ownership rights in property or may have express or implied authority by the owner of property to do so. Normally application of this rule occurs in the cases of wills.

interest in the property.⁸ It is the owner of property who is put to election.

Therefore, he must be given some 'benefit' in compensation for his 'ownership' of the property.

[S. 35]

To attract the application of this rule there must be two sets of rights; one the right of ownership and the other a 'benefit' given under the instrument. In other words, the occasion for election arises only where a benefit is *directly* conferred on the owner of property. Where benefit is given to the owner otherwise than for transferring property or is given to him *indirectly*, there is no case for election. For example, A professes to transfer C's property to B and gives Rs. 5000/- to wife of C. This is not direct benefit to C and therefore C has no duty to elect. In *Valliammai v. Nagappa*⁹ a testator purported to bequeath a joint family property to his coparcener. The coparcener was otherwise under Hindu Law entitled to that property. The Supreme Court held that the coparcener could not be said to have derived any benefit under the will and was not put to election.

Part of the Same Transaction.—The rule of election operates only when the 'transfer' and 'benefit' form part of the same transaction. By same transaction is meant that the transfer of property is to be made evidently only in lieu of the benefit. Thus where the 'benefit' and 'transfer' are interdependent and inseparable, they form part of the same transaction. There is no election if the two are independent transactions.¹⁰ However, it is not necessary that these two transactions are provided on one instrument. It is possible that two separate instruments may be executed to carry out one and the same transaction. Similarly, it is also possible that there is only one instrument containing two separate and independent transactions. In *Mariamada Afzal v. Gulam Kasim*,¹¹ after the death of Nawab of Tank, the Government while transferring chieftship to Nawab's eldest son, transferred some cash allowance to Nawab's second son. The Nawab in his life-time had already granted two villages to the second son for his maintenance. The Privy Council held that since the two grants (cash by the Govt. and villages by Nawab himself in his life) came to second son from two different sources, they were not part of the same transaction. The second son was not put to election.

Owner's Duty to Elect.—The operative part of Section 35 is that if a property is professed to be transferred and in the same transaction some benefit is given to the owner of property then such owner is under a duty to elect. By his election he may either accept the instrument with its all contents or reject it altogether. He has no option to accept only the beneficial part of instrument. Where he elects to accept the instrument, he is entitled to get the benefit, but

8. *Cooper v. Cooper*, (1874) 7 H.L. 53; *Dhanpatti v. Deol Prasad*, (1970) 3 S.C.C. 776.

9. A.I.R. 1967 S.C. 1153; *Piana Singh v. Chamm Singh*, AIR 2009 NOC 3020 (P & H), the right of election was not offered to the plaintiff transferor in the sale deed. In the absence of such right, the transferor cannot claim that he had elected the alternative land in lieu of the disputed land.

10. *Ramayya v. Mahalingam*, A.I.R. 1922 Mad. 357.

11. (1903) 30 Cal. 843; 30 I.A. 190.

he is bound to transfer his property. If he elects to reject the instrument he cannot claim benefit; but he may retain his property.

However, the duty to elect arises only when the person acts in one and the same capacity. That is to say, he is a person who gets benefit and also owns the property. No question of election can arise where a person has two different capacities but under the circumstances they are merged in one person.¹² Where a person has to act in two different capacities e.g. one as individual (owner) and the other vicariously e.g. as guardian or trustee, he may accept the benefit in one capacity and reject the other part of instrument in another capacity.

Mode of Election.—Election may be express or implied. It is a question of intention of the owner of property who is given the benefit. He may express his intention in clear and specific words. Where election is express, it is final and conclusive. The intention of the owner may also be inferred from his acts or conduct. This is implied election.

Implied Election.—Election is implied when the owner of property (donee) (a) being aware of his duty to elect and (b) having full knowledge of the circumstances, accepts the benefit. Such election would mean that he has chosen in favour of the transaction. In other words, where the owner knowingly accepts the benefit, it amounts to his election in favour of the transaction. In the following circumstances, there is *presumption* that he has knowingly accepted the benefit:

(1) Where the owner has enjoyed the benefit for two years without doing any act of refusal or dissent of the transaction;¹³ or

(2) Where the owner of property exhausts or consumes the benefit. Thus, whether he has done some act which renders it impossible to place the parties (interested in the property) in the same condition as before, this too gives presumption of his election for accepting the 'benefit'. For instance, A transfer to B an estate owned by C and as part of the same transaction gives to C a Coal-mine. C does not elect in express words but takes possession of the Coal-mine and exhausts it. C is presumed to have elected to take the benefit and thereby transfer his property to B. This is so, because if C now dissents the transaction it would not be possible for him to place the parties (A and C) in the position prior to his exhausting the said Coal-mine.

Requisition to Elect.—This is special procedure for expediting election. After the expiry of one year, if owner of property does not elect i.e. neither confirms nor dissents from the transfer, the transferee may require him to make such election. And, if he does not elect, within a reasonable time after such requisition, he is deemed to have elected in favour of the transfer.

12. *Deputy Commissioner v. Ram Saurav*, (1917) O.C. 243; 42 I.C. 18.

13. Where he enjoyed the benefit actually for two years it is presumed that he has waived from enquiry. However, this presumption may be rebutted on the ground that he had no knowledge of the transaction and he enjoyed the benefit innocently. On such proof the person (owner) is permitted to make a fresh election.

Suspension of Election.—Where at the time of transfer, the elector (i.e. owner of property) is legally disabled, the election is postponed until such disability ceases or until the election is made on his behalf by a competent authority e.g. his guardian. Legal disability may be minority or lunacy of the elector. Thus, his duty to elect is suspended during his minority or lunacy unless the election is made by his legal guardian.

Election against transfer.—The owner of property whose duty is to make election has freedom to elect either for the transfer or against it. Where he elects against it i.e. dissents from the proposed transfer, he forfeits his claim to the benefit conferred on him. The benefit so conferred reverts back to the transferor or his representative. However, he can claim any other benefit which is given to him independently of the transfer under the same instrument. For example, where a person is given two benefits X and Y under an instrument but only X has been given in lieu of property then, if he elects against the transfer he forfeits only benefit X. But he is entitled to claim benefit Y.

Rights of Disappointed Transferee

When the owner of property elects against the transfer, the transferee to whom the property was proposed to be transferred, cannot get the property. He becomes disappointed as he must have entertained some hope of getting the property. However, such disappointed transferee is not allowed to be a helpless person. He has the following rights :

(i) Where the transfer is gratuitous i.e. without consideration and the transferor dies or becomes incapable of making fresh transfer and,

(ii) Where transfer is with consideration, whether he is alive or dead at the time of election, the transferee is entitled to get a reasonable compensation from the transferor or his representative. "Reasonable compensation" means compensation equal to the value of property proposed to be transferred.

Illustration

The farm of Sultanpur is the property of C and its market value is Rs. 800/-. A by an instrument, proposes to transfer it to B, giving by the same instrument a benefit of Rs. 1000/- to C. C elects against the transfer and decides to retain his farm. C forfeits the benefit of Rs. 1000/- which reverts back to A or his representatives. Now, if A dies before C makes election, his representatives must compensate B (disappointed transferee) by giving B Rs. 800/- out of Rs. 1000/-.

English Law.—Under English law, where the election is against the instrument, the benefit does not revert to the transferor. The owner of property while rejecting the transfer may insist upon taking also the benefit conferred on him. He is, therefore, called a refractory donee or a rebellious donee. But, such refractory donee takes the benefit subject to a charge compensate the disappointed transferee ; the transferor or his representatives are not liable to compensate him. Thus, in the above illustration, the owner of property C while electing against the transfer, would take also the benefit of Rs. 1000/-. But, C

would be liable to give Rs. 800/- to B, the disappointed transferee. A or his representatives are not liable to compensate B.

36. Apportionment of periodical payments on determination of interest of person entitled.—In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

APPORTIONMENT BY TIME

Apportionment means distribution of a common fund between two or more claimants. In a transfer of property, the transferee gets the property with all its incidental benefits, produce or income. Where the property yields some periodical income, there must be specific mention of what portion of its income remains with transferor and what goes to transferee and from which particular date. In the absence of any specific mention by a contract to the contrary or local custom, the distribution or apportionment of the periodical income between transferor and transferee is governed by rules of (i) apportionment by time and (ii) apportionment by estate. This section deals with the rules for apportionment by time.

Section 36 provides that in a transfer of property all rents, annuities, dividends and other periodical payments in the nature of income shall be deemed to accrue from day to day and be apportionable accordingly. Thus, as between transferor and transferee, the periodical income which the property yields, is to be distributed between transferor and transferee at fixed date on the basis of its accrual on each date. For instance, A's house is on rent of Rs. 300/- payable at the end of each month. A sells this house to B on 15th April. Thus B became owner of the house with effect from April 15. A the seller is entitled to get Rs. 140/- as rent for 14 days and B the purchaser shall get Rs. 160/- as rent for 16 days out of Rs. 300/- which is rent for the whole month.

However, this section deals only with the division of periodical income between transferor and transferee ; it does not provide for liability of the lessee or tenant. Thus, in the above illustration, the tenant would be liable to pay the whole rent viz. Rs. 300/- only at the end of the month.¹⁴ Further Section 36 is applicable only to transfer *inter vivos* i.e. between two living persons. Transfers made otherwise e.g. by operation of law, are outside the scope of this section.

37. Apportionment of benefit of obligation on severance.—When, in consequence of a transfer, property is divided and held in

¹⁴ *Lalla Ganga Ram v. Madan Ram*, A.I.R. 1922 All. 275 ; *Satyabama Choudhary v. Ram Kishore Pandey*, A.I.R. 1925 M.P. 115.

several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section unless and until he has reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the State Government, by notification in the official Gazette, so direct.

Illustrations

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30/- and delivery of one fat sheep. B having provided half the purchase-money, and C and D one quarter each. E having notice of this, must pay Rs. 15/- to B Rs. 7.50 to C, and Rs. 7.50 to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation. E had agreed as a term of his lease to perform this work for A, B, C and D who severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such direction as B, C and D may join in giving.

APPORTIONMENT BY ESTATE

Section 36 incorporates apportionment by time and this section deals with apportionment by estate. Section 37 provides that where an estate is transferred in such a manner that after the transfer, it is to be divided in several shares then, the obligation of the benefit of property must be performed in favour of each sharer (owner) in proportion to the value of each share. For example, A sells his house to B and C. Both B and C contribute to the price of the house in 1/3 and 2/3 shares. The house is on monthly rent of Rs. 300/-. The tenant is under an obligation to pay, as rent, Rs. 100/- to B and Rs. 200/- to C. However, this rule is subject to following conditions:

(i) The person under obligation to pay the benefit in proportion to respective shares must have reasonable notice of the fact that on transfer the estate (property) was divided into several specific shares. In the above example, the tenant has no obligation to pay rent to B and C in 1/3 and 2/3 shares respectively if he has no notice of this division of ownership. This notice may be given by transferor or the transferees.

(ii) The obligation must be capable of being performed in parts in favour of each owner. That is to say, the property is capable of being severed or separated. A sells to B, C and D a house situate in a village and leased (rented) to E at a rent of Rs. 30/- per year and delivery of one fat sheep. B has provided half of purchase money and C and D one-fourth each. E having notice of this fact must pay Rs. 15/- to B and Rs. 7.50 to C and Rs. 7.50 to D and must deliver the sheep according to the joint direction of B, C and D because sheep is not capable of division. Where the obligation cannot be severed, it must be performed for the benefit of any one so such owners with the approval of others.

(iii) The severance must not substantially increase the burden of obligation. Apportionment by estate, in essence, means that the obligation which existed as 'whole' before the transfer, shall be severed upon division of ownership of property. This simply severs or separates an obligation; it cannot put any additional obligation. Thus, under Section 37 the burden of obligation must not be increased.

Illustration (b) to Section 37 explains this condition. In the above example, if E (tenant) was required to do ten days labour for the house sold then after severance E has obligation of performing only ten days labour in all on the direction of B, C and D. He is not bound to do more than ten days labour.

Exceptions.—The rule of apportionment by estate does not apply in the following cases:—

(a) *Transfer by operation of law.*—Transfer by operation of law or involuntary transfer e.g. succession, are exempted from this rule. Thus, after the death of a creditor his legal heirs are only jointly entitled to enforce the claim which such creditor, had he been alive, could have enforced singly.¹⁵

(b) *Agricultural tenancies.*—The rule is not applicable to agricultural tenancies because on transfer, the division of obligation to pay to several owners may cause much inconvenience and harassment to agriculturists.

B—TRANSFER OF IMMOVABLE PROPERTY

38. Transfer by person authorized only under certain circumstances to transfer.—Where any person authorised only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between

¹⁵ *Almasa v. Abdul Kader*, (1902) 25 Mad. 26; *Kandiyala Lal v. Chandrar*, (1885) 7 All. 313.

the transferee on the one part and the transferor and other person (if any) affected by the transfer on the other part be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances has acted in good faith.

Illustration

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

LIMITED POWER OF TRANSFER

Section 38 deals with the transfers where transferor has limited power of transfer in respect of an immovable property. His power of transfer is limited in the sense that his authority depends on the existence of only specific circumstances; he cannot transfer except under those circumstances. For example, the guardian of minor's property, the manager (*karta*) of joint Hindu family and widow under old Hindu Law are persons who have limited authority of transfer.¹⁶

This section provides that where a person is authorised to transfer a property only in specific circumstances which are of changing nature then; for validity of the transfer, actual existence of such a circumstance is not necessary. It is sufficient that the transferee has acted in good faith and exercised reasonable care in ascertaining that such circumstance existed. The specific circumstances under which such persons have authority to transfer the property is generally the 'legal necessity' which may differ or vary from case to case. It is for the Court to establish whether such legal necessity existed under the given circumstances or not. Transferee has no authority to determine this 'legal necessity'.¹⁷

The justification of the transfer must be examined in the circumstances prevailing at the time of transfer not at any subsequent event.¹⁷ Therefore, for the validity of the transfer it is sufficient if the transferee in good faith has exercised reasonable care at the time of transfer regarding the existence of such legal necessity. The transferee should have no collusion with the transferor and

16. This section has limited application. It is not applicable to transfers ostensible owners (under Section 41 of this Act) and transfers made by trustees (under Section 64 of the Trusts Act) whose own authority of transfer is also limited.

17. *Megamall v. Varda Kondar*, A.I.R. 1950 Mad. 606.

his intention must not be *malu fide* regarding the transfer when it is being made. Reasonable care of the transferee and his good faith or belief in the existence of legal necessity due to which the transfer or makes the transfer, is sufficient to validate the transfer even though it does not exist actually. In this sense, this provision illustrates the equitable principle that interest of a *bona fide* transferee for value without notice (of actual legal necessity) is to be protected.

Illustration

A, a Hindu widow held the property of her husband as 'widow's limited estate' under old Hindu law. She was entitled to transfer the property only in legal necessity which included also her own maintenance. A sold the property to B alleging that income of the property was insufficient for her maintenance. B satisfied himself by reasonable enquiry that income of the property was not sufficient for A's maintenance and the sale was necessary. Acting in good faith B purchased the property. As between B on one part and A and her collateral heirs on the other part, a necessity for the sale be deemed to have existed and the transfer by A to B is valid. Collateral heirs of the husband are those persons who were entitled to inherit the property held by the widow (A).

39. Transfer where third person is entitled to maintenance.—Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

RIGHT TO MAINTENANCE ETC.

When an immovable property is transferred there is transfer not only of its incidental benefits but also of its liabilities. Benefits and liabilities go together. Section 39 provides that where a third person is entitled to receive maintenance or provision for advancement or marriage out of the income of an immovable property and such property is transferred, the third person can enforce his rights against the transferee subject to the following condition:

- (i) The transfer is for value i.e. with consideration and transferee has notice of such right; or
- (ii) The transfer is gratuitous i.e. without consideration whether or not the transferee has notice of the right of the third person.

This section protects the interest of a person who is entitled to get maintenance etc. from the income or profit of an immovable property. His right to receive the benefit continues after the transfer of that property and is enforceable against a gratuitous transferee or, a transferee for value having actual or constructive notice of this fact. If the above mentioned two conditions

are satisfied then, it is not necessary to prove that property was transferred to defeat the interest of a third person.¹⁸ Mere notice of the fact that such right exists, binds the transferee for value.

The right to receive maintenance as referred in this section is not the right of getting such maintenance only in the first instance; it includes the right to receive enhanced maintenance in future depending on the changed circumstances.¹⁹ Right of maintenance from the income of an immovable property as contemplated under this section is the right of mother, wife, widow, son, and unmarried daughters. A wife is entitled to receive maintenance from her husband and she can enforce her claim against husband's property. In *Ramankutty Purushothaman v. Amirikutty*²⁰ pending wife's application for her maintenance, the husband transferred his properties to his brothers and thereby attempted to defeat her right. The Kerala High Court held that decree for maintenance charging husband's properties was proper and brother cannot be said to be *bona fide* purchasers. A wife is entitled to get maintenance not only from the property of her husband but also from sons who are members of joint Hindu Family. Partition of such property does not affect mother's right to receive maintenance from the income of such property.²¹ Similarly, provision for legitimate expenses for the marriage of the members of a joint Hindu Family may be made from the income of the property.

'Provision for advancement' means that where a property is purchased in the name of near relations such as in the name of wife or children, there is presumption of gift of that property in favour of that relation so as to enable them to anticipate the inheritance. This is a rule of English law and is not known in India. In India, such purchases are *benami transactions*.²²

40. Burden of obligation imposing restriction on use of land.—Where, for the more beneficial enjoyment of his own immovable property, a third person has independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

Or of obligation annexed to ownership but not amounting to interest or easement.—Where a third person is entitled to the

18. Before the Amending Act of 1929, this section provided that right of a third person to receive maintenance etc. from benefit of the property could be enforced by him against the transferee only upon the proof that transfer was made with the intention of defeating his interest and transferor had notice of such intention. *Sadhu Singh v. Gurdwara Sahib Narin*, AIR 2006 SC 3127, the section is in *pari materia* with Section 28 of the Hindu Adoption and Maintenance Act.

19. *Kanuri v. Permasani*, AIR 1971 Ker. 216.

20. A.I.R. 1997 Ker. 306. See also *Hari Lal v. Balwantha*, AIR 1998 All 211.

21. *S. Perasani v. Chelamel*, (1960) 1 M.L.J. 46.

22. Benami transactions are dealt with in Section 41 of the Act. But the law under Section 41 is now subject to the Benami Transaction Act, 1988. For details see comments on Section 41 in the following pages.

benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration

A contracts to sell Sulampur to B. While the contract is still in force he sells Sulampur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

SYNOPSIS

- Restrictive Covenants.
- *Tulk v. Moxhay*.
- Contractual Obligations Annexed to Ownership.
- Notice of Restrictive Covenants.

RESTRICTIVE COVENANTS

Covenant means written agreement or contract with respect to a property. Restrictive covenants are such contracts which restrict the use or enjoyment of the property. In this sense, restrictive covenants are conditions imposed by transferor restraining the use or enjoyment of property by the transferee. The second paragraph of Section 11 validates such directions or conditions imposed by transferor provided they are for beneficial enjoyment of transferor's own land. Under Section 11 the conditions restraining the use or enjoyment of the property transferred may either be affirmative or negative. Where the transferee is required to do something on the transferred land, the covenant or thing, it is affirmative. Where it restrains the transferee not to do certain things, it is negative. Section 11 deals with both kinds of covenants enforceable against the transferee. But, it does not refer to the enforcement of a covenant against the subsequent transferees. Section 40 deals only with negative covenants and provides also for its enforcement against subsequent transferees.

Section 40 provides that in a transfer of property if the transferor imposes a negative covenant then such covenant is binding and enforceable also against the assignee (transferee) of the transferee provided ;

- (i) the covenant is for more beneficial enjoyment of transferor's own land, and
- (ii) the subsequent transfer is for value and the assignee has notice of the covenant or,

(iii) the subsequent transfer is without consideration.

Restrictive covenants are more than personal agreements. They are in the nature of covenants annexed to land as if they are part of the land and together with land they pass on to every subsequent transferees. For instance, A sells a portion of his house to B. The drain of the house passes through the portion sold to B. A covenants that B shall not close the drain. Since this covenant is for more beneficial enjoyment of A's own portion of the house which he retain with him, the covenant is binding on B. Now, if B transfers this portion to C, the covenant is binding also on C. A or his heirs or assigns can enforce this covenant against C. If C sells it to D the covenant is enforceable also against D and so on. Thus, the restrictive covenant, as contemplated in this section, bind not only the subsequent transferee but also the other subsequent transferees in series. Accordingly, it may be said that *restrictive covenants are annexed to land and they run with the land*. Such covenants are burden on the land and are enforceable against any person who has interest in that land. It assumes the character of an equitable encumbrance on the land so that its burden runs with the land i.e. it will bind the land into whatsoever hand it may come save only a transferee without notice.²³

The law enacted in this section is based on English law as laid down in *Tulk v. Moxhay*,²⁴ where it was held that in equity a restrictive covenant imposed for the benefit of the land retained by the transferor was binding on purchaser with notice. In brief, the facts and the law laid down in this case are given below.

Tulk v. Moxhay

T owned a piece of land in London. This land had a garden surrounded by houses. T sold the garden to E with a covenant that E and his successors or assigns shall keep the garden intact as an ornamental garden and shall not construct any building on it. T retained with him the ownership of the houses surrounding the garden. After some time, E sold the garden to another person. He also sold it to some other person and one after the other, the garden was purchased by M. M had notice of the terms of covenant but he attempted to build upon the land (garden). Enforcing the covenant, T sought an injunction to restrain M from constructing buildings in the garden. The Court held that in equity the subsequent transferees in series (M) were bound by the covenant and restrained M from building houses in the garden. Lord Cottenham L.C. observed that since M had notice of the covenant and since T had legitimate interest in preserving the garden, the covenant was enforceable at equity against M. Under the terms of the covenant, M was, therefore, not allowed to construct buildings in the garden.

Contractual Obligations Annexed to Ownership.—First paragraph of Section 40 deals with restrict covenants whereas the second paragraph deals with contractual obligations annexed to ownership. Restrictive covenants are

23. *Rajpur Colliery Co. v. Purnanatham Gelli*, A.I.R. 1959 Pat 463.

24. (1884) 2 Phill. 774 : See *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XIII p 200.

enforceable only when the covenantor's ownership rights in the property is already established. Provisions of the second paragraph deal with personal rights though annexed to ownership in the property but arising out of contract. The person having this right need not be owner of the property.

The second paragraph provides that where a third person is entitled to the benefit of an obligation arising out of contract and annexed to ownership of immovable property then the obligation may be enforced against a transferee for value with notice. For example, A contracts to sell Sultanpur to B. While the contract is still in force, A sells Sultanpur to C. C has notice of the fact that there is a contract of sale between A and B. B may enforce the contract against C who is a third person and stranger to contract just as he could enforce it against A. It may be noted that a contract for sale of an immovable property imposes an obligation on the seller to sell the property to purchaser but it does not create in his favour any interest in the property. However, such contracts create an equitable estate in his favour. This is the principle of English equity which finds place in this part of Section 40. Accordingly, although a contract for sale does not create any interest in land or charge upon it yet, it does create an obligation annexed to ownership of property.²⁵ In *Lalji Jethia v. Kalidas Deschand*,²⁶ the Supreme Court held that a contract for sale does not create an interest in land, but creates a personal obligation of fiduciary nature, therefore, it can be enforced not only against the vendor but also against a volunteer and a purchaser for consideration with notice.

The second paragraph confers only equitable title in land on the holder of a contract relating to the transfer of land. It does not apply to mere personal obligation to pay money to a third party arising out of contract.²⁷ On the other hand, a contract giving rise to a right of pre-emption would create an obligation annexed to the ownership of property and this part of Section 40 is applicable to such obligation and is binding on (i) a purchaser for value with notice, and (ii) on the gratuitous transferee.²⁸

Notice of Restrictive Covenants.—Restrictive covenants and contractual obligations annexed to ownership, both are enforceable only where the transfer or subsequent transfers are for value and transferee has notice of the restrictive covenant on the property. They are not binding on a transferee for value without notice. Notice of the burden on property may either be actual or constructive. For instance, a contract for sale to a purchaser who is a mortgagee in possession, is a constructive notice. Further, the question whether a person had notice or not is a matter of fact and the burden lies on transferee to prove that he had no notice.²⁹ If the transfer of property is without consideration (gratuitous), the restrictive covenant is binding even without any notice.

25. *Boi Dossibai v. Mathuradas*, A.I.R. 1980 S.C. 1338.

26. A.I.R. 1967 S.C. 978.

27. *Achut Shankar v. Kunwar Munshi Nand Lal*, (1931) All. 552.

28. *Besdo Rai v. Jhagrai Rai*, A.I.R. 1924 All. 400 ; *Rakshana Siltaram v. Laxman*, A.I.R. 1960 Bom. 105. See also *Shiraji v. Kaghannah*, A.I.R. 1997 S.C. 1917.

29. *Hem Chandra v. Aringia Bala*, (1925) Cal. 61.

41. **Transfer by ostensible owner.**—Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

SYNOPSIS

- Statutory Changes.
- Benami Transaction Act, 1988.
- Nature and Scope of the Act.
- Exceptions.
- Property in the name of Wife or Unmarried Daughter.
- Law Prior to Benami Transaction Act, 1988.
- Ostensible Owner.
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- Transfer is with consideration.
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- Reasonable care of the transferee.
- Subsequent transfers.

TRANSFER BY OSTENSIBLE OWNER

Statutory Changes.—The law relating to transfer by an ostensible owner as given in Section 41 of the Act is now subject to the provisions of the Benami Transactions (Prohibition of the Right to Recover Property) Act, 1988. Sections 3, 5 and 8 of this Act came into force on 5th Sept. 1988 and the remaining sections on 19th May, 1988 and it extends to the whole of India except Jammu and Kashmir.³⁰ According to Sec. 2 (a) "*benami transaction*" means any transaction in which property is transferred to one person for a consideration paid or provided by another person. This Act provides that where a property is transferred *benami* (i.e. in the name of other), the person, in whose name the property is held, shall become the real owner. Section 4 (1) of the Benami Transaction Act, 1988 lays down that :—

30. This Act is to give effect to the recommendations of the 57th report of the Law Commission of India wherein its object was stated to help curb the evil of the tax evasion and aid social benefit programmes like land reforms. For the Text of this Act See Appendix I, II.

"No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property."

Further, Section 4(2) of the Act provides that :—

"No defence based on any right in respect of any property held *benami* whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property."

By way of an exception to the above-mentioned rules, Section 4(3) provides that these provisions shall not apply in the following cases :

- (a) "where the person in whose name the property is held is a coparcener in a Hindu Undivided Family and the property is held for the benefit of the co-parceners in the family, or
- (b) "where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."³¹

In view of the provisions of this enactment, it may be stated that now an ostensible owner (*benamidar*) has become a real owner except where he is a coparcener in a Hindu Undivided Family or, a trustee, standing in a fiduciary capacity. Accordingly, the law laid down in Section 41 of the Transfer of Property Act stands modified except where *benamidar* is a co-parcener or a trustee or a person standing in a fiduciary capacity.

A significant feature of this Act is that besides prohibiting *benami* transactions, Section 3(3) of the Act provides also that a person who enters into such transaction is punishable with imprisonment for a term which may extend to three years or with fine or with both. However, there is no prohibition and no punishment if the property is purchased in the name of wife or unmarried daughter for their benefit [Sec. 3(2)].

In *Mithilesh Kumari v. Prem Behari Khare*³² the Supreme Court held that Benami Transaction Act, 1988 is a piece of declaratory enactment which makes *benami* transactions punishable and also prohibits the right to defences against recovery under *benami* transactions. The Court observed that as a result of the provisions of this enactment, all properties held *benami* at the time of coming into force of this Act may be affected irrespective of their beginning, duration and origin."

31. Section 7 of this Act repeals also section 82 of the Indian Trusts Act, section 66 of the Civil Procedure Code and section 281 - A of the Income Tax Act.

32. A.I.R. 1989 S.C. 1247 ; See also *Om Prakash Ramul v. Justice Anirudh Lal Bhatti*, A.I.R. 1994 H.P. 27.

This Act came into force during pendency of *Mithlesh Kumari's* appeal before the Apex Court and the Court by giving retrospective operation to Section 4 had held *benamidar* to be the real owner. Subsequently the Supreme Court overruled this decision. In *R. Rajagopal Reddy v. P. Chandrasekharam*,³³ the Supreme Court held that this Act is not retrospective. As regards *benami* transactions entered into before coming into force of this Act, the Supreme Court said :

".....the preamble of the Act itself states that it is an Act to prohibit *benami* transactions and the right to recover property held *benami*, for matters connected therewith or incidental thereto. Thus, it was enacted to efface the then existing rights of the real owners of properties held by others *benami*. Such an Act was not given any retrospective effect by the legislature."

It is to be noted that in this case too, the Act came into force during pendency of appeal before the Supreme Court which, overruling its earlier verdict, held that this Act could not be made applicable to suits filed prior to coming into operation of Section 4 or, for that matter, the whole Act. While elaborating the nature of this enactment, the Supreme Court observed thus :

"the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held *benami* and in this connection it has taken away right of the real owner both for filing a suit or for taking such a defence in a suit by *benamidar*. Such an Act which prohibits *benami* transactions and destroys rights flowing from such transactions as existing earlier, is really not a declaratory enactment."

Nature and Scope of the Act

The nature and scope of this Act, as interpreted and explained by the Supreme Court, at present, may be summarised as under :

- (1) The Benami Transaction Act, 1988 is not of retrospective operation. It cannot be made applicable to suits or proceedings which already started before commencement of this Act and, in such cases *benamidar* cannot be treated a real owner.
- (2) This Act is not declaratory in nature. Rather, it is prohibitory in nature and prohibits *benami* transactions which are entered into after commencement of this Act i.e. 5th Sept., 1988.
- (3) Subject to certain exceptions, all the *benami* transactions entered into after commencement of this Act have been made punishable. Section 3(3) of this Act now 'creates a new offence of entering into such *benami* transactions'.
- (4) In respect of *benami* transaction entered into after commencement of this Act, no person is now allowed to take plea under Section 41 of the

33. A.I.R. 1996 S.C. 238 : See *Murugesu Naticker v. Sodayappa*, A.I.R. 1997 Mad. 4 where, in a partition suit filed prior to commencement of the Act, the Madras High Court held that the defendant is entitled to take plea that he had purchased the suit property *benami* in the name of his father.

T.P. Act that the property stands only in the name of *benamidar* and that he is the real owner. Such plea or defence by a real owner is now not acceptable by the Courts.

Exceptions

Section 4(3) provides two exceptions. The provisions of the Benami Transaction Act do not apply if the *benamidar* (the person in whose name the property stands) is.

- (1) coparcener of Hindu Undivided Family and property is held by him for the benefit of coparceners and
- (2) the *benamidar* is a trustee or, other person standing in fiduciary capacity and property is held by him for the benefit of some other person.

These two exceptions given in Section 4 (3) of the Act are sensible and necessary. On certain occasions the property does not exclusively belong to a person, but he has to hold the property in his name for the benefit of and on behalf of other persons. For example, *karta* of a Hindu Undivided Family holds the property of other coparceners on their behalf. But in official records the name of only *karta* is entered. This is done for the sake of convenience in good faith that such *karta* would not act against the other coparceners (shares of the property). Similarly, in any trust the property is not owned by the trustee; he simply takes care of and also protects the property for the benefit of beneficiaries. For the sake of convenience the property stands in his name. The *karta* of H.U.F. and the trustee are not the real owners of all these properties but they are in fiduciary relationship (relationship of utmost confidence). Therefore, properties in their names have been exempted from the mischief of Benami Transaction Act. Thus, *karta* of H.U.F. or, trustee of any trust do not become real owners although the properties are in their names.

Property in the name of Wife or Unmarried Daughter

Besides the above-mentioned two exceptional cases, the provisions of the Benami Transaction (Prohibition) Act, 1988 do not apply, also in usual *bona fide* transactions where person purchases property in the name of his wife or unmarried daughter. Section 3(2) provides that there is no prohibition on the "purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter".

In *Nand Kishore Mehra v. Sushila Mehta*³⁴ the Supreme Court held that where a person purchases property in the name of wife or unmarried daughter he can lay claim to the property later if he proves that it was not purchased for their benefit. The Court held that neither the filing of a suit not taking of a

34. Judgement Today (1995) 5 S.C. 130.

defence in respect of either the present or past *benami* transactions involving the purchase of property by a person in the name of his wife or unmarried daughter was prohibited under sub-sections (1) and (2) of Section 4 of this Act. But the Court observed further that in view of the Benami Transaction Act the real owner can get relief (i.e. claim ownership) only when he can prove that the properties had not been purchased for the benefit of his wife or unmarried daughter.

A property was purchased in the name of wife through power of attorney executed by her. The husband was the attesting witness to the power of attorney. Thus he knew that the transaction was executed by the wife. An insurance policy was also taken out in her name. The property was mutated in the name of the wife immediately. All this was before 1935 when the Hindu Women's Right to Property Act had not come into force. The couple had a son and seven minor daughters. Intention of the husband to provide for the security of wife and children could be inferred. It was therefore held that it was not a *benami* transaction.³⁵

LAW PRIOR TO BENAMI TRANSACTION ACT, 1988

In view of its academic importance and also because of its relevance for the areas not covered by this Act, the law incorporated in Section 41 of the Transfer of Property Act before commencement of the Benami Transaction (Prohibition) Act, 1988, is being discussed in the following lines.

Ostensible Owner.—Ostensible owner is a person who has all the *indicia* of ownership without being the real owner. An ostensible owner has all the indications of ownership and looks like owner of a property but is not its real owner. Without being an actual owner, such person has apparently all the characteristics of a real owner. Thus, a person may have possession and enjoyment of the property and may also have his name entered in the official records but even then he may not be the real owner of that property. Such situation may arise where for some reasons a person purchases property in the name of another person.³⁶ Where a person purchases property in the name of another person it is called a *benami* transaction. The person in whose name the property is purchased is called *benamidar*. A *benamidar* is an ostensible owner. Where some property was purchased by a father in the name of his minor sons, the Calcutta High Court held that sons were ostensible owners because minor

sons had no means to acquire property and they were not intended by the father to be real owners of property.³⁷

A person does not become ostensible owner if the real owner has entrusted him with temporary control over the property only for some specific purpose or, where he holds a property as a professed agent or as guardian of minor's property or in any other capacity of fiduciary character. A manager cannot be treated as ostensible owner even though his name is entered in the Municipal records as a real owner.³⁸ *Karla* of a joint Hindu family is also not an ostensible owner of the joint family property. Similarly, a trustee or manager of an idol is not an ostensible owner of the endowed property held by him.³⁹

This section is applicable only where the transferor is an ostensible owner. But it is difficult to ascertain whether a person is ostensible owner or real owner because he has all the characteristics of a real owner except the *intention* to own the property. It is for the Court to establish whether the transferor was an ostensible owner. In *Jagadajal Poddar v. Bibi Hazara*,⁴⁰ the Supreme Court observed that whether a person is an ostensible owner is a subjective question to be decided on the basis of facts and circumstances. The Court observed further that following considerations must be taken into account while deciding whether a person is ostensible owner or not:

- (i) Source of the purchase-money i.e. who paid the price?
- (ii) Nature of possession after the purchase i.e. who had the possession?
- (iii) Motive for giving *benami* colour to the transaction i.e. why the property was purchased in the name of other person?
- (iv) Relationship between the parties i.e. whether the real owner and the ostensible owner were related to each other or were strangers or friends?
- (v) Conduct of the parties in dealing with the property i.e. who used to take care of and had control over the property?
- (vi) Custody of the title-deeds.

The burden of proof that a transaction is *benami*, lies on the person who claims that he is the real owner. Where, on the basis of facts produced before the Court, the claimant failed to prove that he was real owner and the person in whose name the property stands is merely a name-giver, the claimant cannot be regarded as real owner of the property.

No retrospective effect.—The Benami Transactions Prohibition Act, 1988 does not have retrospective effect. A suit for recovery of property held *benami* was filed before the enforcement date of the Act. The Supreme Court held that it was not hit by the prohibition under Section 4 of the Act.^{40a}

Transfer by Ostensible Owner.—Section 41 provides that where an immovable property is transferred by an ostensible owner with express or

35. *Bhagwati Prasad v. Pratima Chakraborty*, AIR 2008 SC 543 reversing (2004) 1 Cal HN 185. The Court also said that the practice prevalent at the time of purchasing property in the name of wife could not by itself be determinative of the transaction.

36. It is strange to find that a person provides money and intends to have a property for himself but purchases it in the name of some other person. However, such practice has been common in India and elsewhere. Two apparent reasons may be attributed to such purchases. First, the persistent belief of the Indians, which the author finds among the Hindus, that if a property stands in the name of a female (wife or mother in general) it would be more beneficial as property is believed to be *Laxmi* (the goddess of wealth). Secondly, concealment of money earned illegally or evasion of income-tax. However, object of enacting Benami Transactions Act, 1988 is to prohibit the concealment of money acquired illegally and to curb the evil of tax evasion.

37. *Gurindar Nath Mukherjee v. Soumen Mukherjee*, AIR 1988 Cal. 375.

38. *Mubammad Sulaiman v. Sakina Bibi*, MR (1992) All 392.

39. *Tadkar Krishna v. Kanhigulal*, AIR 1961 All 206; *Baskdeo Gir v. Jagraj Prasad*, (1948) O.W.N. 156.

40. AIR 1974 S.C. 171; See also *Union of India v. Modest Builders & Financiers*, AIR 1977 S.C. 409.

40a. *Smitini Devi v. Sampurnan Singh*, AIR 2011 SC 773.

implied consent of the real owner, the transfer cannot be denied by the real owner provided the transferee in good faith has exercised reasonable care in finding out the transferor's power to make the transfer and the transfer is for consideration. Since ostensible owner is not a real owner of the property, he has no authority to make the transfer. But, under the circumstances laid down in this section, the transfer is binding upon the real owner; it cannot be denied by him. In other words, the real owner is precluded or estopped from denying the transfer on the ground that the transferor was an unauthorised person. Thus, the law incorporated in this section is similar to the rule of estoppel given in Section 115 of the Indian Evidence Act. Section 115 of this Act provides that where a person by his declaration or Act permits another person to believe a thing to be true and to act upon such belief, he shall not be allowed later on to deny the truth of that thing. In this sense, Section 41 of the Transfer of Property Act provides an equitable remedy to a *bona fide* purchaser for value without notice. Validating the transfer made by an ostensible owner is also an exception to the general rule that no person can confer a better title to another, than he himself has.

Essential Conditions for application of Section 41.—Following conditions are necessary for the applicability of this section :

- (i) There is transfer of an immovable property by ostensible owner with express or implied consent of the real owner,^{40b}
- (ii) The transfer is for consideration,
- (iii) The transferee has acted in good faith, and,
- (iv) The transferee has exercised reasonable care in finding out the transferor's power to make the transfer.⁴¹

Express or implied consent of real owner.—The transfer of property must be made by an ostensible owner with express or implied consent of the real owner.⁴² However, whether the consent be express or implied, it must be a free consent. Where a *benamidar* obtains the consent of the real owner by fraud, force, coercion, the consent is not free and this section cannot apply. Similarly, if the real owner is incapable of giving consent (e.g. he is insane or minor), his consent is no consent. If the real owner is minor he is incapable of giving any consent. Therefore Section 41 does not apply where ostensible owner transfers the property of a minor real owner.⁴³

The consent of the real owner is express if it is given in clear words authorising him to make the transfer. But such consent must not be brought about

by a misapprehension of legal rights. The consent is implied if the real owner knows that the *benamidar* is dealing with his property as if it were his own but remains silent or acquiesces. The real owner's acquiescence (silence) or inaction implies his consent. In *Anoda Motian v. Niphantri*,⁴⁴ A purchased a property in the name of his wife B. B's name was entered in the revenue records and she used to deal with the property. After A's death B mortgaged the property to C who took it in good faith believing that B had authority to make the transfer. It was held that since A himself had entered B's name in the revenue record and since A allowed her to deal with the property, there was an implied consent of A to hold out B as an ostensible owner authorising him to transfer the property. Accordingly, the mortgage could not be avoided and the mortgagee was protected under this section.

Silence may amount consent only where the real owner is aware of his rights. Inaction or silence of the real owner at a time when he was not aware of his own ownership rights, would not debar him from claiming that transfer is made by unauthorised person. In such situation, he is entitled to avoid the sale and this section cannot protect the interest of the transferee.

Attestation of the document by real owner does not by itself imply consent. But, if it is proved that attestation took place in circumstances which involved knowledge of or consent to the transaction, it may be regarded as implied consent.⁴⁵

Ramcoomar Kuondoo v. Macquene⁴⁶: The law incorporated in Section 41 is based on the rules laid down by the Privy Council in this leading case. Briefly, the facts and the law laid down in this case were as follows :

One Alexander had purchased some landed properties in Calcutta in the name of Bunnoo Bibee who was his Mistress. Macquene was one of the two children born to him by this Mistress (Bunnoo Bibee). The sale-deed was in the name of Bunnoo Bibee and she also used to manage the properties. Later on during the life of Alexander, Bunnoo Bibee sold the properties to Ramdhone (father of Ramcoomar). After the death of Bunnoo Bibee, Macquene filed a suit against Ramdhone claiming the properties on the ground that her father Alexander had left a will in her favour and that her father was the real owner, not Bunnoo Bibee who was merely a *benamidar*. Ramdhone pleaded that he was a *bona fide* purchaser without notice of the *benami* title of the seller (Bunnoo Bibee). The Calcutta High Court decided in favour of Macquene whereupon Ramcoomar (son of Ramdhone who was then substituted in place of his father) went in appeal to the Privy Council which reversed the judgment of his Calcutta High Court and decided in favour of Ramcoomar.

Allowing the appeal of Ramcoomar, the Privy Council held that even assuming that Alexander was the real owner and that Bunnoo Bibee was merely an apparent (ostensible) owner, since Alexander had allowed (i.e. given

40b. *Kannana Sambamurthy v. Kalipatnapu Achuthanna*, (2011) 11 SCC 153 : (2011) 85 AIR 221, the vendor must be ostensible owner of the property. In this case, it was not even the case of the vendee that the vendor was the ostensible owner. Section 41 was not attracted. He was only a joint owner. He was bound to the extent of his share.

41. *Hardev Singh v. Gurnail Singh*, AIR 2007 SC 1058, the Supreme Court stated the ingredients of the section, explained its rationale and explained the points of difference between Sections 41 and 43.

42. *Syed Abdul Kadir v. Ravi Reddy*, AIR 1979 S.C. 553.

43. *Gurucharan Singh v. Punjab State Electricity Board*, AIR 1989 P & H 127.

44. AIR 1921 Cal 549.

45. *Tundong Khan v. Minak Chand*, (1932) 138 IC 263.

46. (1872) 11 Beng. L.R. 46, 52 I.A. Sup. 40, cited in Mulla's Transfer of Property Act, Ed. VI, p. 187 : See also *Seethammal M. Sindh v. Syed Abdul Rasheed*, AIR 1991 Kant. 223.

implied consent to) Bannoo Bibee to hold herself out as the real owner, he or his representatives could not recover upon their secret title unless they could prove that purchaser had direct or constructive notice of the real title. Delivering its judgment, the Privy Council made following well-known observations :

"It is a principle of natural equity which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value, from the apparent owner in the belief that he is real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon the secret title."

Transfer is with consideration.—Section 41 is applicable only where the transfer by an ostensible owner is with consideration. It does not apply to gifts or gratuitous transfers. Therefore, the real owner is not precluded from denying a gift made by an ostensible owner. However, if the transfer is with consideration, it may be any kind of transfer of property *e.g.*, it may be sale, exchange, mortgage or lease.

Transferee acts in good-faith.—It is necessary that transferee acts in good faith, *i.e.*, he has purchased the property in the honest belief that transferor had power to transfer the property. Good-faith means *bona fide* intention.

Where a person purchases property with full knowledge that the transferor is merely an apparent owner his intention is not *bona fide* and there is no good-faith on his part. Principles of equity, on which this section is based, protects the interest only of a *bona fide* purchaser. *He who seeks equity must do equity.* Thus, this section can protect the interest of only such purchaser whose own conduct is equitable and just. In the absence of good-faith, the Court may presume collusion between ostensible owner and the purchaser. Accordingly, if the transaction is a sham (false) one, Section 41 cannot apply because the transferee would then be in the knowledge of the reality.⁴⁷ Where the parties live in the same village and have knowledge of the fact that another person and not the seller was in possession of the property, the Court may presume absence of good-faith. Similarly, knowledge of any previous dealings with the purchaser or, knowledge of the defective title of the transferor deprives the purchaser of the protection under this section.⁴⁸ In *Gurubhai Singh v. Nikka Singh*,⁴⁹ there was a partition of joint family property but there was also some dispute over the respective shares. While the objection and application for the correction of mistake was still pending, a part of the property was sold. The Supreme Court held that since parties lived in the same village and the facts established beyond reasonable doubt that the purchaser had knowledge of the disputed title of the seller, the purchaser had no good-faith. The Court observed that in the absence of good-faith on his part, the purchaser could not claim the benefit of Section 41.

Where the transferee had full knowledge of the fact that the person purporting to transfer the property to him was not the owner because it belonged

to his grand mother, the Court held that he could not acquire title. The consent letter, even if it was genuine, could not operate as a conveyance or create any interest in favour of the plaintiff.^{49a} Where the vendor did not give original title deeds to his vendee, the sale was held to be not in good faith. The title deeds were lying with a bank as a security. The Bank's claim to recover vacant possession of the property was allowed.^{49b}

Even if the purchaser makes due enquiry about the title of the seller but has no good-faith *i.e.* purchases the property with dishonest intention, he cannot get the benefit of this section. This section imposes both conditions : good-faith and reasonable enquiry about the title; they are not so in the alternative.⁵⁰

Reasonable care by the transferee.—Good-faith or *bona fide* intention of the transferee is not enough. To attract the provisions of this section the transferee must also have exercised reasonable care in ascertaining the title and authority of the transferor. Reasonable care means that care which a man of ordinary prudence should take while making inquiries regarding the title of an immovable property.^{50a} But it is not possible to lay down any general rule regarding the nature of enquiry to be made by the transferee which may be called as 'reasonable care' for all the cases. The standard of enquiry expected from the transferee depends upon the facts and surrounding circumstances which may vary according to the different circumstances of each case.⁵¹ However, the enquiry made by the purchaser must be diligent and not superficial or casual. Some specific circumstance or fact should be pointed out as a starting point of an enquiry which might have led to some result.

Revenue records are not the records of title. Inspection of the revenue records or municipal registers alone is, therefore, not sufficient. The fact that the transferor's name is entered in the revenue records or in the registers of an office is not, by itself, sufficient proof of the title of the transferor. The purchaser who wants to get the protection under this section must not rely solely on the revenue records but make further enquiries. In *Nageshwar Prasad v. Raju Pateshwar*⁵² A was the real owner of a property. In the revenue records instead of A the name of B was entered by mistake. B mortgaged the property to C who accepted the mortgage relying on the revenue register. A denied the transfer on the ground that B was not authorised to mortgage the property. C claimed the benefit of this section on the ground that he had taken reasonable care in ascertaining the title of B by inspecting the revenue records. The Privy Council held that since C had not exercised reasonable care in enquiring about the authority of B, he cannot get the benefit of this section. The Court observed that if C had made further enquiries, he would have found that B's name was entered in the register by mistake and A had already raised an objection against the wrong entry of B's name in the register.

49a. *Abul Sritashan v. Deepnash*, AIR 2012 Chh. 117.

49b. *Aunth Kaur v. Recovery Officer*, A.I.R. 2012 NOC 48 P & H. See also *Manjari Devi v. Usish Devi*, A.I.R. 2014 Chh. 22, joint property, no partition, purchaser did not try to ascertain whether this transferor had the right to do so, no good faith, no protection of the section.

50. *Kinnia Afzal v. Md. Shabb*, AIR 1936 Nag. 214.

50a. *Babji Rani Deb v. Manik Day*, AIR 2014 Gau. 56, no care exercised to see the status of the

person in reference to the land he was transferring.

51. *Begus Singh v. Ram Jannam* AIR, AIR 1961 Pat. 16.

52. (1915) 20 Cal. W.N. 265 : 34 I.C. 673 P.C.

47. *Rai Sanil Kumar v. Thakur Singh*, AIR 1984 Pat. 80.

48. *Lala Jagmohan Das v. Lala Indar Prasad*, AIR 1979 Oadh. 160.

49. AIR 1963 SC 1917.

A purchaser who claims the protection of Section 41 must also inspect the records at least for twelve years in the Registration Office.⁵³ In *Muhammad Saifi v. Muhammad Saifi*,⁵⁴ A the real owner mortgaged his property to B. It was usufructuary mortgage and B was in possession of the property. By an error, the name of B was entered in the revenue record. B sub-mortgaged the property to C. Mortgage by A and sub-mortgage by B both were registered. A filed a suit against C to redeem the mortgage. C pleaded that A has no right against him because B was an ostensible owner and his name was entered in the records. The Privy Council observed that if C would have enquired further he would have found that in the mortgage deed to C, B has described himself to be A's mortgage not owner of the property. Therefore, the Court held that C was not entitled to the protection of this section and A can enforce his rights against C.

Subsequent transfers.—The protection of a *bona fide* transferee for value under this section is not limited to the first transferee. A transferee from the first transferee and every subsequent transferee is entitled to the protection of this section provided transfer in his favour fulfils the condition prescribed here. Thus, the subsequent transferee must be a transferee for value, without notice of the real owner's title and having made reasonable enquiry of the transferor's power of disposition. However, if all conditions are satisfied, such transferee shall not be deprived of the protection even if the first or any intermediate transferee had notice of the title of the true owner.⁵⁵

Transferee under Displaced Persons (Compensation and Rehabilitation) Act, 1954.—It has been held by the Full Bench of the Punjab and Haryana High Court that the expression "ostensible owner" would include a transferee from the State or Union Government of evacuee property. The above Act, being a special Act, its provisions have overriding effect upon the T. P. Act, it being a general Act. A transfer from such allottee to any other person would have been held under the category of transfer by ostensible owner and therefore valid but for the fact that the original allottee had committed fraud. He had no title and could convey no title.^{55a}

42. Transfer by person having authority to revoke former transfer.—Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value.

53. *Mazhar Hasan v. Muhtiar Hasan*, (1938) All. 64.

54. AIR 1930 All. 807, 122 I.C. 871.

55. *Purandhar Nath v. Harrai Mall*, AIR 1940 Cal. 565.

55a. *Niranjan Kaur v. Financial Commissioner, Revenue and Secretary to Govt. of Punjab*, AIR 2011 P & H 1 (FB).

Afterwards, A thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

REVOCACTION OF TRANSFER

This section provides that where a transfer is made subject to a reservation that transferor may revoke it and the transferor exercising this right transfers the same property subsequently to another transferee for value, then the subsequent transfer operates as revocation of the first. The right reserved for the power of revocation must be subject to some condition enforceable at law. In other words of restrictive covenants not enforceable in law. It should not be in the nature of transfer may or may not be for consideration but the subsequent transfer (which has the effect of revoking the first transfer) must be for consideration. However, where the first transfer is gift and is revocable at the will or desire of the donor, it is in itself void under Section 126 of this Act.

The illustration to Section 42 clearly explains the law laid down in this section.

43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition, but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

SYNOPSIS

- Transfer by Unauthorised person : Feeding the Grant by Estoppel.
- Provisions of Section 43.
- Essential Conditions for the Application of Section 43.
 - Transferor is unauthorised person.
 - Fraudulent or erroneous representation.
 - Transfer is for consideration.
 - Subsequent acquisition of authority by transferor.
- Option of the transferee.

- Rights of the second transferees.
- Transfers forbidden by Law : Invalid Transfers.
- Punjab.
- Difference between S. 41 and S. 43.
- English Law.

TRANSFER BY UNAUTHORISED PERSON : FEEDING THE GRANT BY ESTOPPEL

A person who has no title or interest in an immovable property, cannot transfer that property. If he does so, the transfer is by an unauthorised person. This section provides that if a person having no authority, professes (agrees) to transfer an immovable property, he is estopped from denying the transfer when he subsequently acquires such authority. The law incorporated in Section 43 is based on following two principles:

- (a) The common law doctrine of estoppel by deed, and
- (b) The equitable principle that if a person promises more than he can perform, then he must fulfil the promise when he gets ability to do so.

Where a person has no right to transfer a property, he should not agree or profess to transfer any interest in it. Transfer of interest in land is known as creation of grant. In other words, in the absence of authority for transfer, the transferor should not have created any grant in respect of that property. If he subsequently acquires the right to transfer the property, how can he be allowed to go back from his earlier grant? Equity and law do not permit him to deny his earlier statement. Thus, he would be estopped (excluded or stopped) from going back what he promised or granted earlier. Therefore, he cannot avoid the transfer because of his own earlier grant which he created by misrepresenting his right. In other words, he is estopped from denying the transfer subsequently. His estoppel is backed by or, is supported by his own earlier grant. Accordingly, the law laid down under this section is known under English Law as the doctrine of feeding the grant by estoppel. In the situations stated above, the estoppel of the unauthorised transferor is fed (strengthened) by his own commitment i.e. creation of interest. His own act or representation of authority to transfer precludes him from denying the transfer afterwards. In *Rajlaxmi v. Fernando*,⁵⁶ explaining the basis of this rule the Privy Council stated thus:

"Where a grantor had purported to grant an interest in land which he did not at the time possess but subsequently obtained, the benefit of his subsequent acquisition goes automatically to the earlier grantee, that is, it feeds the estoppel."

This is estoppel by deed i.e. under document. Estoppel is a rule of evidence which precludes or debars a person from denying his statement when it goes against him. But, here estoppel affects the legal relation between transferor (before and after he gets power of transfer) and the transferee for value without notice.⁵⁷

The law incorporated in Section 43 is based also on the principles of equity. Equity has it that if a person promises to perform more than he can, he must fulfil his promise when he acquires the capacity to do so. The law under this section is an example of the maxim of equity that *equity regards that as done which ought to be done*. When the transferor professes or agrees to transfer an interest without authority, his act is unjust and against the principle of equity. But, subsequently when he gets the authority, equity would demand that since the transferor has now acquired the authority he should pass on the title to transferee. Thus, as soon as the unauthorised transferor gets authority for transfer, an equitable estate (interest in property) is created in favour of the transferee. However, a further conveyance is necessary before the transfer is completed in favour of the transferee. Therefore, under this section, the unauthorised transferor may be compelled to transfer the property which he had promised without having any authority.

Provisions of Section 43.—Section 43 enacts that—

- (i) if a person professes to transfer an immovable property by fraudulently or, erroneously representing that he has authority to do so, and
 - (ii) the transfer is for consideration, and
 - (iii) such transferor acquires the authority subsequently,
- then the transferee may at his option compel the transferor to pass on the property to him:

Provided that the interest of a subsequent transferee for value is protected if he had no notice of the existence of such option.

Conditions for Application of Section 43.—Following conditions are necessary for the applicability of this section—

- (a) The transferor is an unauthorised person.
- (b) There is fraudulent or erroneous representation by transferor regarding his right to transfer.
- (c) The transfer is for consideration.
- (d) The transferor subsequently acquires authority for the transfer.

Transferor as unauthorised person.—A person having no title or

interest in an immovable property at the date of transfer, is not entitled to transfer that property. If he transfers the property without authority, the transfer is by an unauthorised person. In the eyes of law, such person cannot pass on any legal title or interest in respect of the property transferred by him. Therefore, such person actually does not transfer the property; he merely professes or, purports to transfer. The legal effect of such transfer would be that the transferor has promised to transfer a property and the transferee has accepted it. Accordingly, the transfer by an unauthorised person would mean that there is a contract for the creation of an interest in future. Subsequently, for some reason or the other, when he obtains title or interest in that property, he is authorised to make the transfer. This section compels him to transfer the property legally which he had professed to transfer without authority.

56. A.I.R. 1920 P.C. 216.

57. T.V.R. Subba Chetty's family Charities v. Raghuvaran Mudaliar, A.I.R. 1916 S.C. 797.

Fraudulent or erroneous representation.—There must be erroneous or fraudulent representation by the transferor regarding his authority to transfer the property. In the absence of such representation this section does not apply. Misrepresentation may either be oral or in writing. It may also be in the form of silence or inactivity of the transferor. The false statement may be made fraudulently or innocently. It is not necessary that wrong statement regarding title of the transferor has been made intentionally; it may be also by mistake. But it is necessary that misrepresentation is in respect of transferor's authority to transfer the property. If the transferor misrepresents his capacity such as age or state of mind, this section cannot apply. For example, if a minor makes false representation that he is adult, this section shall not apply. In other words, Section 43 is applicable only to such cases where the transferor is unauthorised person for want of title. It does not deal with transferor's want of capacity such as minority or insanity.

It is essential that the transferee was misled by the representation of the transferor. Whether it is fraudulent or erroneous but the representation is such that the transferee has believed it and in good faith acted upon it. Where there is neither any representation regarding the authority to transfer nor the transferee has acted upon such representation, the transferee cannot claim the benefit of this section. In *Sri Narayan Chandu Saha v. Dipali Mukerjee*⁵⁸ there was no evidence (nor was it ever pleaded) that son of the owner of property made any representation that he was owner or landlord of the suit property. The transferee also knew that he (son) could not be owner during the life of his father. Subsequently when son of the owner became one of the co-owners upon death of his father, the transferee claimed protection under Section 43. The Calcutta High Court held that since the transferee had knowledge that son was not entitled to transfer, the transferee cannot claim protection under Section 43 because he cannot be said to have been misled about protection under Section 43. The Court observed that provisions of this section would be applicable only when the transferor makes a representation of authority and the transferee acts on such representation. If the fact of defective title of the transferor is known to both the parties there is collusion and Section 43 cannot apply.

In *B. Narayanaswami Raju v. Krishnamoorthy Mudaliar*,⁵⁹ it was found that the vendee had purchased the property with full knowledge of rights of their vendors. There was also no evidence to show that there had been any fraudulent or erroneous representation acting on which representation the vendee had purchased the property. The Madras High Court held that here the doctrine of feeding the grant by estoppel was not attracted. No estoppel can arise by reason of false statement where the truth is known to both the parties.⁶⁰ Similarly, in *Pandiri Bangarum v. Kurumoori*,⁶¹ A was entitled to one-third share in a joint family property. He mortgaged half of this property to B. Subsequently when

A's father died he became owner of half share in the family-property. B, the mortgagee, enforced the mortgage against half of the family-property. It was held that since B knew the fact at the time of mortgage that A was entitled to only one-third share in the property as he was not misled. Therefore, B could enforce his mortgage only against one-third share and not against half which A acquired subsequently. Thus B could not get the benefit of Section 43.

This section does not impose upon the transferee any duty to make reasonable enquiry about the title of the transferor. All that is required for the applicability of Section 43 is that there is false representation by the transferor in respect of his right to transfer, and acting upon this representation he has purchased the property. Further enquiry regarding the authority of the transferor is not necessary. In *Rampyari v. Ram Narain*⁶² the facts were that a *sirdar* had deposited the required money to get *Bhimdhar* rights in the land. In such cases the title is acquired only after the issuing of a certificate to that effect. The *Sirdar* sold the land before the certificate conferring title was issued. The Supreme Court held that if the *Sirdar* had effected the sale after such deposit by erroneously representing that he was entitled to transfer the land, Section 43 applied. It was not necessary that purchaser should have made enquiry that certificate was not issued. It may be concluded, therefore, that the person acting on the representation is under no duty to make reasonable enquiry.⁶³ His acting upon the representation of the transferor is sufficient.

The defendant believed that the allotment letter issued by the Development Authority was a title deed which conferred upon him the ownership rights. Both parties believed that by virtue of the allotment order, the defendant could convey title to the property and the plaintiff could purchase the same. The defendant had not made any false representation on the point. The defendant did not get title deeds executed within the time fixed by the parties in their agreement and not even after such time. It was held that Section 43 was not attracted.⁶⁴

Transfer is for consideration.—Section 43 does not apply to a gratuitous transfer. Thus, where the transfer is without consideration e.g. gift, the transferee cannot get the benefit of this section. The section is applicable only to transfers for value. It may be applied to sale, exchange, lease, mortgage because these transfers are supported with consideration.

Charge is not transfer of any interest in immovable property. Therefore Section 43 cannot be made applicable to a charge created on any immovable property.⁶⁵

Subsequent acquisition of authority by transferor.—The transferor must subsequently acquire title or interest in the property which he had professed to transfer earlier. Transferor may acquire authority for the transfer

58. AIR 1985 S.C. 694.

59. *Zagu Ram v. Venkata Krishnappa*, AIR 1946 Mad. 107; *Copi Nath v. Rupa Ram*, AIR 1930 All. 785.

60. *M. Rathnam v. Sushedamma*, AIR 2009 Kar. 79; *Jameela Bevi v. Bashier*, AIR 2012 Ker 107, person entitled to succeed made representation as such and found a purchaser, her paternal uncle, for consideration. Transfer was held to be not invalid.

61. *Perichanan Pal v. Nirode Kumar Biswas*, AIR 1962 Cal. 12.

58. AIR 2002 Cal. 229.

59. AIR 1998 Mad. 193.

60. *Mohori Bibi v. Dharmodas*, (1903) 30 L.A. 114.

61. (1911) 34. Mad. 159.

by any legal method. He may acquire title or interest in property either by a transfer *inter vivos* or by operation of law. Thus, he may obtain the property by purchase, gift or exchange etc. He may also obtain the property through inheritance or under a will. The transferor may have defective or incomplete title in the property which subsequently becomes perfect. He may acquire the property under a partition or family settlement. The subsequent acquisition of property may also be in the form of subsequent allotment to the partner of a property transferred by him as exclusive owner before allotment.⁶⁶ But, Section 43 is not applicable to involuntary transfers like auction-sales by order of the Court. Therefore, auction purchaser cannot invoke the provisions of this section for his benefit.⁶⁷

This section is applicable also to those cases where the transferor had lesser interest than he had transferred. Subsequent enlargement of lesser or limited interest would also be treated as subsequent acquisition of property. For example, there may be restriction in the alienation of property which was later on removed or there was prior encumbrance which was subsequently discharged.⁶⁸ In *B.S.D. Malimandal, Kanpur v. Prem Kumar*,⁶⁹ three daughters inherited their father's property for a limited estate. They had divided the property into three shares, each being in exclusive possession of her respective share. A who was one of the daughters sold the property in her possession to B. Subsequently her other sisters died and A became the last limited owner and got exclusive possession of the entire estate. The Supreme Court held that B was entitled to the property under Section 43 which substantially satisfies the equitable principles of feeding the grant by estoppel.

Option of the transferee.—Under Section 43, the property does not pass on automatically to the transferee. If the essential conditions for the application of this section are fulfilled, the transferee may compel the transferor to pass on the title to him. The transferee may or may not enforce his claim. Thus, the transfer of subsequently acquired property takes place not at the moment when the interest is acquired but, when transferee exercises the option and claims that the interest should now be transferred to him.⁷⁰ Such an option does not arise if the unauthorised transferor did not get title to the property by succession, inheritance or otherwise to any interest in the property during his life time.^{70a}

However, this option is open only during the subsistence of the contract. If the transferee repudiates the contract before unauthorised transferor acquires authority to transfer, his option is extinguished. And, in such a case, if the

66. *Punni Lal v. Mishr*, (1940) All. 453.

67. *Joti Singh v. Ram Das Malhotra*, A.I.R. 1946 S.C. 2773.

68. *Malingappa v. Krishnappa*, (1908) 29 Mad. 113.

69. A.I.R. 1985 S.C. 1103.

70. *Pramath Khamru v. State of Orissa*, A.I.R. 2009 Ori 166, the transferee has to exercise the option of asserting that the interest stands transferred to him. There should be no impairment of the right of a subsequent bona fide transferee. The section applies only when the transferor had no interest in the property at all, and not when he had an interest but it was not transferable.

70a. *Agricultural Produce Marketing Committee v. Banarima*, A.I.R. 2014 S.C. 3000. Such purchaser could not raise any claim against the subsequently created succession rights.

transferor acquires the title subsequently, the transferee cannot get the benefit of this section. He would not be allowed to insist upon transferring the property under a contract which he himself had repudiated before it could be executed.

Rights of the second transferees.—The second paragraph of this section is a proviso to the section. It protects the interest of a bona fide second transferee for value without notice of the 'option' of first transferee. Accordingly, where the second transferee (i) in good faith, has (ii) paid consideration and (iii) without notice of the option (iv) takes the property before option is exercised, then he shall not be affected by the first transferee's claim under Section 43.

Under the circumstances stated above, in between the first transferee's claim under Section 43 and the second transferee, the property has to go to the second transferee. For example, A is a Hindu who separates from his father B. On partition, the property X is retained by A and property Y goes to B. Representing that he owns both properties, A sold X and Y to C. After sometime when B died, A became owner of both the properties. But, before C could exercise his option to compel A to transfer property Y to him, A secretly sold Y to D. D purchased property Y in good-faith without having any notice of the option of C. D is entitled to get property Y as against the claim of C. It is to be noted that this protection is available also to any subsequent transferee from the second transferee provided the conditions mentioned above are fulfilled.

Transfer forbidden by Law : Invalid Transfers.—Section 43 is not applicable where the transfer is forbidden by law e.g. being against public policy or being a transfer by minor. This section may cure only the want of title of the transferor at the date of transfer. Where the transfer is void *ab initio*, this section cannot apply even if the transferor subsequently acquires the right to transfer. Thus, where the transfer is void because transferor was minor at the date of transfer, the transferee cannot invoke the provisions of this section when such transferor attains the age of majority. Similarly, where property is non-transferable within the meaning of Section 6 of this Act, Section 43 cannot be made applicable to validate such transfers. Where the initial transaction itself is contrary to law, the benefit of subsequent acquisition of title is not available for validating the transaction.⁷¹

An illustrative case was before the Supreme Court. A person purported to be the owner of the suit property and conveyed it by a sale deed during the pendency of a title suit between him and another person, who was the appellant's predecessor in interest. The suit was decided in favour of the other person. He died intestate and the property was inherited by her husband (who had purported to transfer) and son. The Court said that Section 52 binds only the purchaser during pendency of the suit. The section did not render the transaction void at its inception. The transaction was not contrary to any provision of law, nor it was hit by Section 23 of the Contract Act, 1872. The transferor had acquired interest in the property to the extent of his share. Section 43 operated to perfect the purchaser's title in the suit property to the extent of his share in the property.

71. *N. Srinivasan Rao v. Special Commr*, (2006) 4 SCC 214.

Section 43 does not require (as distinguished from Section 41) that the purchaser should take care and act in good faith to see that his transferor had the power to transfer. Even if it were so, there was no finding that the purchaser knew that his transferor had no interest in the property.⁷²

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Apparent Conflict Between Section 43 and Section 6 (a).—Under Section 6(a) the *spes-successionis* or 'chance of an heir apparent to get property in future' is a non-transferable interest and its transfer is void *ab initio*. Section 43, on the other hand, validates a transfer made without title when such transferee subsequently acquires the title. Thus, where the transferor is an heir-apparent and he transfers *spes-successionis*, the transferee should not be given the title subsequently. However, there have been cases where an heir-apparent has transferred the property by misrepresenting that he has title and the transferee got the benefit of Section 43 when such heir-apparent got the title after the death of the propertius. Therefore, there appears to be an apparent conflict between Section 6(a) and Section 43 of the Act. The question may also arise that if a transfer has been expressly declared as void *ab initio* how can it be given effect under Section 43?

The Supreme Court has set at rest the controversy by holding that there is no conflict between these two sections and both may operate simultaneously. In *Jumma Masjid v. Kodimantandra*⁷³ the facts were that an heir-apparent sold when the transferor became entitled to his share as legal heir, Masjid invoked Section 43 to compel him to pass on the property to Masjid. It was contended on behalf of the transferor that the interest transferred was *spes-successionis* the transfer of which was void *ab initio* under Section 6(a) and that Section 43 could not be made applicable to validate a transfer which was void *ab initio*. The Supreme Court held that Masjid was entitled to get the benefit of Section 43 and there is no ground for reading any conflict between the two sections; both the provisions can be given full effect in their respective spheres. The Court observed that Section 6(a), was a rule of substantive law whereas Section 43 was based on estoppel which is a rule of evidence (procedure). The Court pointed out that it makes no difference in its application, whether the Court of title in the transferor arises by reason of his having no interest whatsoever in the property, or of his interest therein being that of an expectant heir.

It is submitted that since one of the conditions for the applicability of Section 43 is that the transferee must have been misled on the erroneous representation of the transferor, therefore, if the transferee had no knowledge of the *spes-successionis* then Section 43 is to apply. But, if the fact is known to the transferee there is no question of his being misled; there is then collusion and Section 6(a) is to apply.

⁷² *Hardev Singh v. Gurmait Singh*, AIR 2007 SC 1058.

⁷³ A.I.R. 1962 SC 847.

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OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

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Punjab.—In Punjab where the Transfer of Property Act is not applicable, the transfer of *spes-successionis* is valid. Accordingly, even before the Supreme Court's decision in the *Jumma Masjid*'s case, the benefit of Section 43 was available to the transferees in cases of the transfers of *spes-successionis*. It was held that a mortgage of property where the mortgagor had only reversionary interest, becomes effective as soon as the succession opens out.⁷⁴

Difference between Section 41 and Section 43.—Section 41 and Section 43, both, are based on the rule of estoppel and both are made by persons who represent that they have authority to transfer though they are not entitled to do so. But, there are the following points of difference between these two sections:

1. In Section 41, the transfer of property is complete though it is not by real owner whereas, in Section 43 there is no transfer of property; the unauthorised person merely professes or contracts to transfer the property. Thus, in Section 41 the transfer of property is already complete but in Section 43 the transfer of property has to be completed subsequently.

2. It is necessary for the applicability of Section 41 that the transferee, besides having good faith, must also exercise reasonable care in inquiring the authority of the transferor. In Section 43 the transferee need not exercise reasonable care in inquiring the authority of transferor; it is sufficient that he was misled upon the representation of the transferor.

3. In Section 41 the estoppel works against the real owner i.e. real owner is precluded from denying the transfer. Whereas, in Section 43 the estoppel works against the unauthorised transferor.

English Law.—Under English law, the doctrine of feeding the grant by estoppel is an application of equity bringing about an equitable estate on acquisition.⁷⁵ Under Indian law, no equitable estate is created, but it gives right to an obligation. It may be noted that under English Law, when the transferor subsequently acquires an interest sufficient to satisfy the grant, the estate passes on without any further act of the transferor or transferee. In India, the subsequent acquisition of authority to transfer by the transferor does not pass on the title automatically to the transferee; he has to exercise his option for it.

44. Transfer by one co-owner.—Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part-enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of transfer, the share or interest so transferred.

⁷⁴ *Aulur Singh v. Lal Singh*, A.I.R. 1934 Lah. 996; 155 IC 880.

⁷⁵ *Colliger v. Isaacs*, (1881) 19 Ch. D. 342; *Talby v. Official Receiver*, (1889) 13 AC 523.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

TRANSFER BY A CO-OWNER

Where a property is jointly owned by two or more persons, it is a co-owned property. Each co-owner may have equal or unequal shares, but until partition is effected and their respective shares are separately possessed, every co-owner is entitled to common enjoyment of property. Hindu undivided family property is a common example of such joint property. Section 44 enacts that where a co-owner transfers his share, the transferee is substituted in the property to the extent of the share transferred to him. In other words, the transferee takes the place of the transferor (co-share) who has transferred his share. As such, the transferee too is entitled to common enjoyment of the joint property together with other co-owners. Such transferee steps into the shoes of the transferor. This, section provides that he will acquire all the rights and liabilities which the co-owner (transferor) had in the joint property at the date of the transfer. Thus, just as the co-owner was entitled to partition, the transferee too has a right of partition as against other co-owners.⁷⁶ Similarly, the transferee shall be bound by the conditions and liabilities affecting the share transferred to him with effect from the date of transfer. For example, A, B and C are co-owners of a piece of land having equal shares. The land is subject to mortgage. C sells his one-third share to D without effecting partition. Under this section D would be substituted in place of C for all rights and liabilities. D is therefore entitled to common enjoyment of the land as C was before the transfer. D has also the right to get one-third share partitioned from other co-owners and have separate possession of his part of land. But, the one-third share which D has purchased is to remain still remain subject to mortgage.

Dwelling House.—The above-mentioned rule does not apply to a co-owned dwelling house. Where the co-owned property is a joint-family house in which family members of the co-owners are living together then, although a co-owner has right to transfer his share but the transferee is not entitled to be substituted in his place. Where the transferee gets a share in a residential house owned by family members of joint family he is not entitled to have common enjoyment or possession of the property. The object of the second paragraph of this section, which makes an exception in respect of dwelling house, is to avoid inconvenience which may be caused by substitution of a stranger who may be not only of a different caste from his own but also different in race and religion. In the absence of this provision there is every possibility of breaches of peace which might be caused by an attempt of the purchaser to take by force joint-possession with the other members of the family.⁷⁷

76. *Venkayya v. Venkaiya Subbarao*, A.I.R. 1957 Andh. p. 619.

77. *Balaji v. Ganesh*, (1981) 5 Bom. 499. Cited in *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XII, p. 247.

However, the transferee is entitled to partition and in such cases the proper course is to direct the delivery of possession by partition in execution proceedings⁷⁸ or to leave the purchaser to his remedy by separate suit for partition.⁷⁹

Where a share in a dwelling house is transferred without partition and the transferee too does not maintain suit for partition but attempts to take possession of his share, the other co-owners may restrain him from taking possession. In *Dorab Cawasji Warden v. Coomli Sorab Warden*,⁷⁹ there was common dwelling house in which all family members were living together. After the death of one of the brothers, the widow and sons of the deceased sold their share. The Supreme Court held that this transfer would come under the other second paragraph of Section 44. The Court observed that since irreparable injury is likely to be caused by the entry of the transferee and since the balance of convenience was in favour of the appellant (other co-owner), interim mandatory injunction against vendors and vendees regarding possession, can be issued.

"Dwelling house" means not only a residential structure or building but the expression includes also the adjacent buildings, gardens, courtyard, orchard and all that is necessary for the convenient use of the house.

Section 44 contemplates all kinds of transfers. Accordingly, this section is applicable where a co-sharer transfers his share by way of sale, gift or lease and mortgage. However, partition is necessary to give effect to the mortgage if the transfer is in the nature of a mortgage.⁸⁰ A lessee of an undivided share too has right of partition if such partition is necessary to give effect to the lease. Where, a share of a house used by all members of a family is transferred by way of lease, the lessee must get his part partitioned. If he is unable to get his portion partitioned then the other co-sharers may have right to restrain the lessee from getting possession of the house with others. In *Asim Ranjan Das v. Binul Ghosh*,⁸¹ a house was in common enjoyment of all family members of an undivided family. One co-sharer leased out his share without effecting partition whereupon the stranger lessee (tenant) attempted to enter into possession jointly with members of the family. The Calcutta High Court held that interim injunction restraining the stranger lessee can be granted. However, in *Hari Singh v. Madan Lal*,⁸² A entered into a premises followed by his mother and brother who joined him later on. The Govt. first granted licence and subsequently executed lease in his favour. Delhi High Court held that A's mother and brother are not co-tenants and A (lessee) is entitled to possession of

78. *Ravi v. Ram Kishan*, AIR 2010 All 125.

79. A.I.R. 1990 S.C. 867; *Binul Ghosh v. Meenu Devi Panth*, AIR 2008 Ori 156, provisions of TPA and Partition Act, 1893 (Section 4), relate to dwelling houses. Sale of undivided property to a stranger by the defendant co-heir was held to be illegal. Civil suit seeking decree for pre-emption in respect of property sold to a stranger by co-heir was held to be maintainable. *Anjan Borah v. Choudhury v. Kishan Borah*, AIR 2013 Gau 42, sale by a co-sharer of a dwelling house of his share would attract Section 44 even if the portion was indicated by details. Concurrent finding that the sale was invalid, was held to be proper.

80. *Hari Singh v. Madan Lal*, AIR 1940 Mad. 491.

81. A.I.R. 1992 Cal. 45.

82. AIR 2001 Delhi 231.

the whole premises including the portion in possession of his mother and brother. The Court observed further that the fact that A had filed a suit for possession of portion in his mother and brother's possession did not mean that A was not lessee of the whole premises.

45. Joint transfer for consideration.—Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interest to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such person shall be presumed to be equally interested in the property.

SYNOPSIS

- Joint Transfers.
- Joint-Tenants and Tenants in Common.
- Transfers by operation of law.

JOINT TRANSFERS

This section incorporates rules regarding the quantum of interest of each transferee when an immovable property is transferred for value jointly to two or more persons without specifying their respective shares. When property is transferred to several transferees jointly then there might be two situations. *Firstly*, the consideration amount may be a common fund, and, *secondly*, the consideration may be advanced separately by each transferee. This section provides rules regarding the respective interests of the transferees in both the situations. Thus Section 45 deals with apportionment or distribution of interest in property transferred to two or more persons.

This section lays down that where consideration is paid by the transferees from a common-fund, the interest of each transferee in the property shall be identical with their interest (contribution) in the common-fund. But, where the consideration is paid by each transferee from their separate funds the transferees take interest in the property in proportion of their respective share in the whole consideration amount. In other words, where the consideration paid out of separate funds belonging to each transferee, then shares in the property are proportionate to the consideration paid by each.

Where a property is purchased out of common-fund in the name of any one of the contributors with consent of the others then, the person in whose name the property is purchased does not become the exclusive owner of that property. All persons who contributed to the fund for purchase of the property would be co-owners and the person in whose name the property was purchased cannot set-up exclusive title to himself.⁸³

Rules laid down in this section are with respect to transferee's interest *inter se* (i.e. transferee's interest in between themselves) in a joint property. But the rules under this section are subject to any contract to the contrary. Accordingly, the provisions of this section do not apply where the quantum of interest to be taken by each transferee has already been agreed upon under a contract.

The second paragraph is a proviso to the section. It provides that in the absence of any evidence to show the respective interest of the transferees in the common fund, or the shares which they have advanced, the transferees shall be presumed to have equal interests in the property. Where a lease is executed in favour of three persons, in the absence of any evidence of a contract to the contrary, the lessees must be presumed to be equally entitled. However, the presumption of equal interest in property may be, drawn only in the absence of any evidence to the contrary; not in all the cases.

In *Rajeshwari v. Batchand Jain*⁸⁴ in a joint Hindu Family all the members were residing in a house and carrying on joint business of the family. No partition had taken place. A plot of land was purchased and the source of money appeared to be joint earnings. Madhya Pradesh High Court observed that there is no presumption that every property purchased by the members of joint Hindu family is property of joint family. Burden of proving so, lies on the person who is asserting it to be joint property. Accordingly, the Court held that presumption of equal interest under Section 45 of the Act is not attracted.

Section 45 deals merely with the quantum of interest and its determination where there are more than one joint-purchasers. It does not provide for the method of creating common ownership or the manner in which several persons can become co-owner in respect of a single property.⁸⁵ This section does not say whether the several transferees hold the property as joint-tenants or tenants in common.

Joint-Tenants and Tenants in Common.—The concept of joint-tenancy and tenancy in common is a concept of English Law. Except in the case of coparcenary between members of a Hindu Undivided Family, the concepts of joint tenancy is unknown in India.⁸⁶ Under English Law, when

83. *M. Pinter v. Marcel Martins*, AIR 2002 Kant. 191.

84. AIR 2001 Mad. p 179.

85. See *Mulla*, TRANSFER OF PROPERTY ACT, Ed. VI, P. 212

86. *Jageswar Narain v. Ram Chand Dutt*, (1896) 23 I.A. 37; *Venkatkrishna v. Satyanathi* AIR 1986 SC 751.

Property is a co-owned property, the co-owners may hold the property, either as joint-tenants or tenants in common. The two concepts may be distinguished as under :

- (i) Joint-tenancy implies unity of titles as well as unity of possession. Tenancy in common signifies only the unity of possession.

- (ii) Where the co-owners hold property in joint-tenancy, upon the death of any one of them his share goes to the survivors. But, where the co-owners hold it as tenants-in-common, upon the death of a co-owner his share goes to his heir or representative.

In India when a transfer is made to two or more persons jointly, they are deemed to have a tenancy-in-common even though their shares are not specified or separated when the transfer was made.

Transfers by operation of law.—Section 45 may be made applicable to transfers by operation of law or involuntary transfers on the ground of equity, justice and good-conscience.⁸⁷ Transfer by operation of law takes place either by order of Court or under wills or under the law of inheritance.

46. Transfer for consideration by persons having distinct interest.—Where immovable property is transferred for consideration by persons having distinct interest therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value and where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations

- (a) A, owning a moiety, and B and C each a quarter share, of mauza Sultampur, exchange an eighth share of that mauza for quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura and B and C each to a sixteenth share in that mauza.
- (b) A, being entitled to life-interest in mauza Atrali, and B and C to the reversion, sell the mauza for Rs. 1,000/-. A's life-interest is ascertained to be worth Rs. 600/-. The reversion Rs. 400/-. A is entitled to receive Rs. 600/- out of purchase money. B and C to receive Rs. 400/-.

TRANSFER BY PERSONS WITH DISTINCT INTERESTS

Section 46 deals with the problem where a co-owned property, in which each owner has distinct interest, is transferred and there is no contract for their

respective shares in the consideration amount. This section is converse of Section 45 because this deals with apportionment of consideration in between the joint transferors, whereas Section 45 provided for apportionment of interests amongst the joint-transferees.

The rule laid down in this section is that where an immovable property is transferred for consideration by two or more persons having distinct interest in it then, in the absence of contract to the contrary, the transferors shall be entitled to share in the consideration proportionately to the value of their interests in the property. The joint-transferors may have equal or unequal interests in the property transferred. Where the transferors have equal interest in the property, the consideration shall be divided equally amongst them. But, where they have unequal interests, the share of each transferor would be in proportion of their respective interest. For instance, if a property co-owned by A, B and C each having equal interest is sold for Rs. 30,000/- then A, B and C would be entitled to get Rs. 10,000/- each. Similarly, a house is co-owned by A, B and C in which A has ownership of half and the remaining half is shared equally by B and C. The house is sold for Rs. 10,000/-. A is entitled to get Rs. 5,000/- whereas B and C are entitled to get Rs. 2,500/- each.

Joint-transferors need not necessarily be co-owners. They may be persons having different kinds of interests by way of different titles in respect of a property. Thus, persons having distinct interests may be owner of a lease and reversioner, a life tenant and remainderman. When a life-estate and reversion is sold together, the proper mode of apportioning the consideration is to value both the interests separately. In the illustration (b) to this section, the life-interest and reversion both have been sold together but they are valued separately.

Like preceding section, the rules relating to apportionment of consideration amongst transferors is also subject to any contract to the contrary. Where the transferors have already specified their respective shares in the consideration under a mutual contract, the rules under this section are not applicable.

47. Transfer by co-owners of share in common property.—Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal proportionately to the extent of such shares.

Illustration

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultampur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

TRANSFER OF A SHARE IN COMMON PROPERTY

This section deals with the transfer of a share, without specifying from which of the several shares of a common property the transfer has been made. Section 46 provided rules for cases where the entire interest is transferred but this section deals with cases where only a share or part of co-owned property is transferred. Section 47 enacts that where the co-owners of an immovable property transfer a share (part) of the property without specifying as to whose share has been transferred, then the share of each co-owner is reduced proportionately. In other words, where several owners who hold the property as tenant-in-common, transfer a part of property without specifying as to whom this part belongs then the transfer of that part shall take effect on the shares of all of them proportionately to the extent of their shares. Where the co-owners hold the property in equal shares, each share is reduced equally. Where the shares of co-owners are unequal, the reduction in the greater share would be greater and lessor in the smaller share. Thus, each co-owner is deemed to have transferred the same fraction of the share transferred which he has in the whole property.

Illustration to the section explains the rule clearly. A is the owner of an eight-anna share and B and C each are owner of four-anna share in *mauza* Sultanpur. A transfers two-anna share in *mauza* Sultanpur to D without specifying from whose share the transfer is made. Under Section 47, the two-anna share shall be given to D from the shares of A, B and C in proportion of their respective shares in *mauza* Sultanpur. Now, in the whole property A has eight-anna share i.e. half share and the remaining half is shared by B and C equally i.e. each having one-fourth share. Share transferred is two-anna in the whole property. Accordingly, half of two-anna i.e. one-anna shall be given from A's share and half-anna from B and half-anna from the share of C.

48. Priority of rights created by transfer.—Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

PRIORITY

Owner of an immovable property is at liberty to transfer any kind of interest in his property to any person. He may transfer partial interest to one person and absolute interest to one person and absolute interest of the same property to another person. For example, he may give his house on lease to A and mortgage the same house to B and ultimately sell it to C. Whenever such successive transfers are made, the ultimate transferee takes the property subject to prior interests. But, there might be cases when same kind of interest is transferred successively to two or more persons in the same property. In such cases, use or enjoyment of the property by one may be against the interest of the

other and the transferees cannot enjoy the property together. To deal with cases where same property or interest therein is transferred to different persons in such a manner that use or enjoyment by one transferee is against the interest of the other, the rule of priority is applied.

It is an equitable principle expressed in the maxim : *qui prior est tempore potior est jure*, which means "first in time is better in law". Law incorporated in Section 48 is based on the equitable principle stated above and provides that if there are successive transfers of the same property, the later transfer is subject to prior.

Section 48 enacts that where,

- (i) a person purports to create rights in or over the same immovable property,
- (ii) at different times, and
- (iii) the subsequent transfers are such that the rights in property cannot be exercised to their full extent together,

each later created right shall be subject to the previously created rights.

The rule under this section is subject to any special contract or reservation binding the earlier transferee.

This section deals with cases where the successive interests are equal but conflicting. It does not apply where the interests created are unequal and there is no inconsistency in them. For instance, where a property is mortgaged to A and thereafter sold to B, the interests of A and B are unequal, A has partial interest whereas B has absolute interest. B takes the property subject to mortgage in favour of A. In legal language B purchases the equity of redemption. But, where there are two mortgages of the same property one after the other, the later mortgage is subject to prior. That is to say, the subsequent mortgage may sue for sale on his mortgage but the property shall be sold subject to prior mortgage. Where the two successive mortgages are usufructuary mortgages i.e. mortgage with possession, the prior mortgagee is entitled to possession under the rule of priority.⁸⁸

Different Dates.—It is necessary that the two transfers are made successively i.e. have been made on different dates or, if made on the same date, one is earlier to the other. Where the transfers are made through registered instruments, it is the date of execution and not the date of registration which determines the precedence. Where the two transfers are on the same date, evidence may be taken to determine as to which transfer was made earlier and the first one gets priority. But, if the priority cannot be determined, the rule of priority has no application and in such a circumstance, the mortgagees take as

⁸⁸ See Section 47, Indian Registration Act, 1908 : *KCI Bank v. SINDCO Leathers Ltd.*, AIR 2006 SC 2089, the first charge holder would have repaid first where the whole cannot be paid back fully.

tenants-in-common or joint-tenants.⁸⁹ It may be noted that this section deals with priority of transfers in general terms on the basis of the date of transfers. Special rules relating to priority have been dealt with at appropriate place in this Act especially under Sections 78, 79 and 80.

Exceptions.—The rule of priority as given in Section 48 is not applicable in the following cases :

- (1) Where the instrument of transfer is executed under fraud, misrepresentation or in gross-negligence, the transferee cannot claim priority. The priority in such cases is forfeited.
- (2) Rule of priority is subject to the doctrine of notice. Registration, where it is compulsory, is constructive notice of the transaction. Accordingly, under Section 50 of the Registration Act, a prior unregistered instrument where registration is optional, does not get priority over a subsequent registered deed the registration of which is compulsory.
- (3) In a suit for partition, if a receiver, under the order of the Court, mortgages whole or part of the estate, the mortgagee would be entitled to priority over an execution creditor by whom the property was attached after the commencement of the suit for partition.⁹⁰
- (4) The lien of a co-sharer for owely money on partition though subsequent in time, is given priority over earlier mortgagees of property allotted to the co-sharer who is liable to pay owely.⁹¹
- (5) Maritime Lien constitutes another exception to the operation of Section 48. Where a salvage lien is created, *i.e.*, where the lien is created for moneys advanced for the purposes of saving the property from destruction or forfeiture. The salvage lien is confined in English law to maritime lien.⁹²
- (6) Where there are exceptions carved out by a statute *e.g.*, Section 98 of the Bengal Tenancy Act, 1885.⁹³

49. Transferee's right under-policy.—Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much

thereof as may be necessary, to be applied in reinstating the property.

INSURED PROPERTY

This section deals with the rights of transferee where the property transferred to him is insured against loss or damage by fire. The section enacts that where an immovable property is insured against any loss or damage by fire and that property is transferred for consideration, then the transferee may require the transferor to apply all or so much of money received as is necessary for the restoration of property. Where an insured property is sold, the transferee gets the absolute interest in respect of that property together with the right of being compensated in case the property is damaged or destroyed provided such damage is caused after the contract of sale. Accordingly, when after the sale, the property is destroyed or damaged upon which the transferor gets the money under insurance policy, the transferee, who now becomes owner, is entitled to claim that money from the transferor or, at least so much of money which is required to reinstate the property. However, the purchaser cannot claim the money directly from the insurance company.⁹⁴ In cases of lease of an insured property, the lessor gets the money and under this section, the lessee may require the lessor to restore the property, from the money which he got from the insurance company. Where insured property is mortgaged, in case of any loss or damage by fire the mortgagor gets the insured money. Under this section, the mortgagee would have the right to require the mortgagor to apply that money in reinstating the security.

It is significant to note that provisions of this section are based on the dissenting opinion of James, L.J. in *Rymer v. Preston*.⁹⁵ In this case, there was a contract for the sale of a house which was insured against fire. After the completion of the sale but before actual transfer, the house caught fire and was destroyed where upon the seller received the insured sum of money. The purchaser claimed the insurance money from the seller. It was held that the purchaser was not entitled to get the insurance money received by the seller. But, James L.J. in his dissenting judgment expressed his views that the purchaser was entitled to be compensated from out of the money received by the seller because after the contract for sale the purchaser was owner in equity and the seller held the insurance money as a trustee for him.

However, as the section provides, the above-mentioned rule is applicable only in the absence of any contract to the contrary.

50. Rent bona fide paid to holder under defective title.—No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to

89. *Ram Ratan v. Bishnu Chaud.* (1906) 11 Cal. W.N. 732.

90. See *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VI, p. 217.

91. *Poonamlingam Serrai v. Verril*, A.I.R. 1926 Mad. 186.

92. *ICI Bank v. SIDCO Leathers Ltd.*, AIR 2006 SC 2088 ; *ICI Bank v. SIDCO Leathers Ltd.*, AIR 2006 SC 2088, the first charge holder would have repaid first where the whole cannot be paid back fully.

93. *Ibid.*

94. *F.V. Chetty Firm v. Motor Union Insurance Co.* (1922) 67 L.C. 777.

95. (1881) 18 Ch. D. 1, C.A. cited in *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VII, p. 218.

whom such payment or delivery was made had no right to receive such rents or profits.

Illustration

A lets a field to B at a rent of Rs. 50/-, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

SYNOPSIS

- Bona fide payment of Rent.
- Good faith.
- Rent paid in advance.

BONA FIDE PAYMENT OF RENT

Section 50 protects the interest of a tenant who makes *bona fide* payment of rent to a person having defective title in the property. It lays down that if a tenant makes *bona fide* payments of rent or profits in respect of an immovable property to a person who is not legally entitled to receive it, he would not be liable to pay it again to the rightful person. For instance, A an owner of a house lets out the house to B who pays the rents regularly to A. B sold the house to C and neither A nor C could inform B about the change of ownership. B in good faith continued to pay the rents to A for three months before which he could not know about the sale. Under this section B is not liable to pay the three months rents to C who was actually entitled to receive it. However, the person who is not entitled to receive the rents shall not be allowed to retain the amount so paid, he is liable to pay it over to the rightful person. The protection under this section does not extend to the person who receives the payments⁹⁶; it protects the interest of a tenant in good faith.

Good faith.—It is necessary that the tenant has paid the rents in good faith. If the tenant has actual or constructive notice of the fact of change of ownership and even then continues to pay the rents to the former landlord, he cannot get protection under this section. The payments are deemed to be *bona fide* payments only where the lessee sincerely believes that he is giving the rents to a rightful owner. Where a tenant is given notice of the transfer of ownership either by transferor or by transferee, he must pay the rents, as due from the date of transfer, to the transferee. If a tenant having notice from the transferor but not from the transferee makes payment of rents after such notice to the transferor, he cannot be said to be in good faith.⁹⁷ Although there is no statutory obligation on the transferee to give notice of the assignment to the lessee but if he fails to do so and the lessee pays rents to the transferor, the transferee will not be entitled to recover it from the lessee.⁹⁸

96. *Alimuddin v. Hiralal*, 23 Cal. 87 (F.B.).

97. *Nabin Chandra v. Surendra Nath*, (1905) 7 C.W.N. 454.

98. *Tiloke Chandra Surana v. J.B. Banlie & Co.* A.I.R. 1926 Cal. 204.

The language of this section is general and may apply to all such cases where a lessee or tenant makes payment of rents to a person who is not entitled to receive it. Thus, in case of conflicting claims regarding the legal title of an immovable property if the tenant makes payment in good faith to one having possession, he shall not be chargeable with any rent if it appears afterwards that the person to whom the payment was made had no right to receive it. Where the sister and widow as heir of a deceased had conflicting claims and the tenant made payment of the rents without notice of rival claims, to the widow who was in possession of the property (although sister was legally entitled to it) the payment by the tenant was held to be protected under this section.⁹⁹

Rent paid in advance.—Provisions of Section 50 do not apply to rents paid in advance. Where a tenant pays rents in advance, it is treated as a loan advanced by him to the landlord, although the landlord (lessor) may have agreed to apply it in discharge of the tenant's obligation to pay rent as it accrued due.

Rent paid during pendency of suit.—Where the property is leased during the pendency of a suit or proceeding respecting the title of the property and the rents are paid by the lessor to one of the party to suit, this section does not apply. In other words, the doctrine of *lis pendens* given in Section 52 of this Act, deprives the tenant or lessee of the protection under this section.¹

51. Improvements made by bona fide holders under defective titles.—When the transferee of immovable property makes an improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstance aforesaid, the transferee has planted or sown on the property crops which are growing, when he is evicted therefrom, he is entitled to such crops and to free ingress and egress together and carry them.

99. *Karvaramma v. Lingappa*, (1909) 33 Bom. 96 I.C. 654; See *Mulla's : TRANSFER OF PROPERTY ACT* Ed IX p. 348.

1. *Trilokchandras v. Mangaldas*, A.I.R. 1954 Sau. 82.

SYNOPSIS

- Improvements
 - Principle of Equity
 - Essential conditions of Section 51
 - Transferee of immovable property
 - Good faith
- Improvements
- Crops
- Nature of Relief to Transferee
- Valuation of Compensation

IMPROVEMENTS

Principle of Equity.—Section 51 is based on the principle of equity that "one who seeks equity must do equity". This section gives relief to a transferee who makes improvements in good faith on the land held by him and is being evicted subsequently by a person having better title. If a person purchases a land say, from an ostensible owner (*benamidar*) believing that the vendor is the real owner and in good faith also constructs a building on the land then, it is obvious that the real owner may ask the purchaser to vacate the land on the ground of his better title. But, since the conduct of the real owner, who now claims better title in land, is itself unjust and inequitable because he had allowed the vendor to sell the land and had also allowed the purchaser to make improvements on the land, equity may not help him in asserting his title. If he seeks equity's help in claiming his better title in the land and thereby evicting the purchaser, equity would require him to compensate the purchaser for the improvements made by him. Thus, if it is just and equitable that a person having better title is entitled to have possession of a property, it is also just and equitable that a *bona fide* transferee be compensated for his *bona fide* investments in making improvements and who is now being evicted without any fault on his part. The person having better title and claiming transferee's eviction cannot be allowed to be benefited at the cost of the transferee. Accordingly, a transferee who after having made improvements in good faith, is subsequently evicted by a person having better title, he has rights either to have the value of the improvements or to purchase the property on which improvements have been made.

The person claiming eviction of a *bona fide* purchaser who made improvements, must be estopped from refusing to pay the compensation because his own acquiescence (silence) was responsible for those improvements. Therefore, in some cases the rule laid down in this section has been regarded as an extension of the doctrine of estoppel.² But, despite similarity in the two

principles, the correct view is that this section is based on the above-said maxim of equity rather than on the doctrine of estoppel. There can be no question of any acquiescence or waiver where both the parties are in error of their rights.³ Accordingly, it may be concluded that provisions of this section do not rest on the doctrine of estoppel by acquiescence; they are based on the maxim 'one who seeks equity, must do equity'.

Provisions of Section 51.—Section 51 provides that:—

- (i) When the transferee of immovable property,
- (ii) makes any improvement on the property,
- (iii) believing in good faith that he is absolutely entitled thereto, and
- (iv) he is subsequently evicted therefrom by any person having better title.

the transferee has right to require the person causing eviction to either give the value of improvement or to sell his interest in the property.

Essential Conditions of Section 51.—As is clear from the analysis of the provisions of this section, following conditions are necessary for the applicability of this section:

- (a) The person who is being evicted is a transferee, and
- (b) Such transferee had made improvements believing in good faith that he was absolutely entitled to do so.

Transferee of immovable property.—The equity enacted in this section gives relief to the transferee of an immovable property who believes himself to be absolutely entitled to make improvements. The scope of the section is limited in the sense that it applies only to transfers or absolute interests e.g. sale, gift or exchange.

In the following cases the transferee has been given the benefit of this section:

- (1) Where the transferee who purchased a property was given possession of a larger area than he was entitled under the deed and who made improvements on excess land under a mistaken belief that he was entitled to do so.⁴
- (2) Where the transferee had purchased an immovable property exceeding Rs. 100 under an oral agreement.⁵
- (3) Where the transferee has purchased a life-estate believing that the vendor was absolutely entitled to sell the property.⁶
- (4) Where the transferee purchased the property *bona fide* in ignorance of mortgage.⁷

3. *Abdul Kadir (Dr.) v. Shadia Myrila James*, A.I.R. 1957 Pat. 308.

4. *Nalasa Tiwari v. Dist. Board of Tanjore*, A.I.R. 1926 Mad. 921.

5. *Topanmal v. Chanchalmal*, (1940) Kar. 241.

6. *Narjanima v. Nedarammal*, (1907) 17 Mad. L.J. 622.

7. *Narayan Rao v. Basanrayappa*, A.I.R. 1956 S.C. 727.

2. *Cangalhar v. Radhappa*, A.I.R. 1929 Bom. 246; *Sukha Rao v. Vena jingra Sumi*, A.I.R. 1930 Mad. 298; *Bhargava v. Rajend*, (1918) 40 L.C. 464.

(5) Where the transferee had purchased a minor's property from *de facto* guardian believing that the guardian was authorised to sell the property.⁸

(6) Where the transferee was a grantee from a Tehsildar but believing that he was absolutely entitled to do so had planted certain trees on the land.⁹

These are some examples where a person who made improvements on the property has been regarded as 'transferee' for purposes of this section. This emphasis in such cases is not upon the legality or nature of absolute transfer but on *absolute belief of the transferee* that he has right to make improvements. However, there must be some valid reason before a person can be treated as 'transferee' believing that he has right to make improvements. In that following cases the transferee cannot be given the benefit of this section:

Lessee.—A lessee cannot be regarded as a 'transferee' under this section and as such he cannot claim compensation for any improvements made by him.¹⁰ There is no reason that a lessee should believe that he is absolutely entitled to the property held by him even if he is a permanent lessee.

Mortgagee.—A mortgagee is also not a person who could believe that he is absolutely entitled to the property mortgaged to him. As such, Section 51 cannot give relief to mortgagee who makes improvements on the mortgage-property.¹¹

Trespasser.—A trespasser can never be regarded as transferee, therefore, he cannot claim compensation for any improvement made on the property held by him illegally.¹² In *Emerald Valley v. Estate Ltd. Badaguli*,¹³ a person trespassed into a Government property. He was fully aware that it did not belong to him. Kerala High Court held that on eviction from the land he was not entitled to benefit of compensation for the improvements made by him on the said land.

Good Faith.—Section 51 incorporates the principle of equity. Equity cannot help a person whose own conduct is unjust. Therefore, this section does not apply where the transferee's own conduct was *mala fide*. It is necessary that the transferee had made improvements believing in good faith that he was entitled to make such improvements.

Such belief of the transferee may be a mistaken belief or may be negligent but, it must not be with dishonest intention. Exercise of reasonable care is not necessary; *bona fide* intention is sufficient. The expression 'believing in good faith' means honest belief. If the transferee has knowledge that he is not entitled to make improvements, there is no good faith on his part and Section 51

8. *Horlial v. Gordian*, A.I.R. 1927 Bom. 611; *Durgazi Rao v. Father Sahib*, (1907) 30 Mad. 197.

9. *Chennappiguda v. Secretary of State*, A.I.R. 1925 Mad. 963.

10. *Nanda Kumar v. Benomali Gajam*, (1902) 29 Cal. 871; *Board of Wolf v. Subramaniam Natchar*, (1926) Andh. W.R. 391.

11. *Sathian Kumar v. Indian Bank*, A.I.R. 1967 S.C. 1296.

12. *Doga Ram v. Shyam Sundari*, A.I.R. 1965 S.C. 1049.

13. A.I.R. 2001 Ker. 29.

cannot apply.¹⁴ There is no objective test for ascertaining the honest belief of a person but, it may be inferred from the surrounding circumstances. A person who purchases a property with notice of a prior contract of sale by his vendor, cannot be said to have honest belief of his right to make improvements. Similarly, a person who knows that his title may be terminated any time, has no good faith and such transferee cannot get the benefit of this section. Where a person makes improvements on a property in anticipation of a grant, he cannot be regarded as having good faith in respect of his rights to make such improvements.¹⁵ On the other hand, where a widow, having limited estate, made a gift for the benefit of her husband's soul and the donee believed himself absolutely entitled to make improvements, it was held that donee had made improvements in good faith and was entitled to get compensation when ejected subsequently.¹⁶ Good faith may also be inferred from the fact that the transferee has expended a large sum of money in making improvements upon the land held by him.¹⁷ In *Sayed Ali Moosa Raza v. Razia Begum*,¹⁸ the plaintiff had title over the land. The defendant made constructions over it in a *bona fide* belief that he had valid title over the land. However, the defendant neither established nor pleaded necessary ingredients of estoppel. The Andhra Pradesh High Court held that the defendant had made constructions in good faith in a *bona fide* belief of valid title of land. Therefore, the ingredients of Section 51 are attracted and the defendant has right to require the plaintiff to elect to have value of construction or sell his (plaintiff's) interest in land to defendant. The onus of proving good faith lies on the transferee.

In another similar case,¹⁹ the respondent who was in possession raised unauthorised constructions on a part of the land owned by the appellant despite her objections. No plea of estoppel, acquiescence or waiver etc. was made by the respondent in the written statement. It was held that the appellant (owner) could not be debarred from recovering possession by any such plea as estoppel, etc. The raising of constructions was not a *bona fide* act. Section 51 was not applicable. The owner could not be compelled to accept compensation. She was entitled to actual physical possession.

Improvements.—Improvements must be such which increases the value of property permanently. Expenditures incurred by transferee for manuring the field so as to have good harvest is not improvement. Similarly, spending money on levelling the ground is also not improvement on the land.²⁰ Repair of the house is not regarded as any improvement by the purchaser. Where the

14. *Ramen Bhagathi v. Pappu Bhaskaran*, A.I.R. 1990 Ker. 112; *State of J. & K. v. Gulam Rasool*, (1978) Kash. L.J. 260.

15. *Danaramm v. Padma Bhatnagar*, (1915) M.W.N., 28 L.C. 51.

16. *Panchand v. Manoharlal*, (1917) 42 Bom. 136, cited in Mulla's TRANSFER OF PROPERTY ACT, ED. XIII p. 225.

17. *Ram Churn v. Bhagwan Dei*, AIR 1955 All. 339.

18. AIR 2003 Andh. P. 2.

19. *Durga Devi v. Banti Prasad*, AIR 2008 NOC 1619 (HP).

20. *Marjappa Thevar v. Kalimimal*, AIR 1971 Mad. 198; *Sudeha Muthu v. Santhana*, (1915) 241 C. 879.

purchaser has put a new staircase in an old house, it was held that it was not an improvement within the meaning of this section.²¹ Making permanent structures e.g. constructing buildings on the land is an improvement on the land and the purchaser of the land, on being evicted, may claim compensation under this section.

Crops.—Where the transferee has planted or sown crops on the property which are growing when he is being evicted, he is entitled to have such crops provided he has grown the crops in the *bona fide* belief that he is absolutely entitled to do so. Moreover, as it is necessary for removing the crops, the transferee shall also have the right to go and take the crops from the land.

Nature of Relief to Transferee.—Where a *bona fide* transferee makes improvements in good faith on the property from which he is evicted, the transferee may get *any one* of the following reliefs.

- (a) He may claim compensation for his improvements, or
- (b) He may require the evictor to sell the property to him.

The option is with the person who evicts the transferee. Transferee has to select any one of the reliefs given to him by the evictor. Transferee cannot compel the evictor to give any particular relief to him.²² Normally the person having better title would give the cost of improvement. But, if he is too poor to give the cost or it is otherwise not beneficial to him, he would sell his own interest in property to the transferee.

Valuation of Compensation.—Where the transferee selects to have compensation for the improvements, he can claim the market value of the improvements made by him. The evictor cannot insist the transferee to accept only the actual money expended by him on making the improvements years ago. However, the market value of the improvements to which the transferee is entitled, is determined and awarded by the Court. But, the transferee claiming compensation must provide evidence for the money spent by him so as to enable the Court to estimate the value of compensation.

Since the Court has to determine the saleable value of the improvements it is necessary that Court should know the extent of expenditure over the improvement.

Under this section, the value of compensation to be awarded to the transferee is as on the date of eviction rather than on the date when option was made or on which the transferee selects his relief. In *Margana Rao v. Basavarajappa*,²³ the Supreme Court held that even where the decree directs possession on payment of compensation or in the alternative to sell the property, and time is given to the transferee for his election, none the less, the

21. *Sidhanarayana v. Subbaraya*, AIR 1929 Bom. 230.

22. *Keshavnath v. Subbarao*, AIR 1961 Mys. 62; *Maitland v. British India Corpn.*, (1932) ALL 210.

23. AIR 1956 S.C. 777.

date of valuation of improvement is to be the date of eviction and not the date of election.

52. Transfer of property pending suit relating thereto.—

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

SYNOPSIS

- Doctrine of lis pendens.
- Basis of lis pendens.
- Essential conditions for application of Section 52.
- Pendency of suit or proceeding.
- Compromise suit.
- Pendency in Court of competent jurisdiction.
- Right to immovable property must be involved.
- Rights in movables.
- Suit must not be collusive.
- Property is transferred or otherwise dealt with.
- Involuntary transfers.
- Transfers with permission of Court.
- Transfer by any party to suit.
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- Effect of the principles of lis pendens.

LIS PENDENS

Doctrine of *lis pendens*.—The law incorporated in Section 52 is based on the doctrine of *lis pendens*. '*Lis*' means 'litigation' and '*pendens*' means 'pending'. So, *lis pendens* would mean 'pending litigation'. The doctrine of *lis pendens* is expressed in the well-known maxim: *pendente lite nihil innovatur*, which means 'during pendency of litigation, nothing new should be introduced'. Under this doctrine, the principle is that during pendency of any suit regarding title of a property, any new interest in respect of that property should not be created. Creation of new title or interest is known as a transfer of property. Therefore, in essence, the doctrine of *lis pendens* prohibits the transfer of property pending litigation. It is a very old doctrine and has been operating in the English Common Law. Under this doctrine the judgments in the immovable properties were regarded as overriding any alienation made by the parties during pendency of litigation. Later on, this doctrine was adopted also by equity for a better and more regular administration of justice.

Basis of *lis pendens*.—The basis of *lis pendens* is 'necessary' rather than actual or constructive notice. It may be said that this doctrine is based on notice because a pending suit is regarded as constructive notice of the fact of disputed title of the property under litigation. Therefore, any person dealing with that property, pending litigation, must be bound by the decision of the Court. But, the correct view is that *lis pendens* is founded on 'necessity'. For administration of justice it is necessary that while any suit is still pending in a Court of law regarding title of a property, the litigants should not be allowed to take decision themselves and transfer the disputed property. *Lis pendens* is, therefore, based on 'necessity' and as a matter of public policy it prevents the parties from disposing of a disputed property in such manner as to interfere with Court's proceedings. When a litigation is already pending the necessities of judicial functioning would require that the decision of the Court should be honoured and be made binding not only on the parties but also on all such persons who derive title under them by alienation made by any one of them pending litigation. Without any rule prohibiting transfer pending litigation, all suits regarding specific property would be rendered meaningless by successive alienations making it almost impracticable for any person to settle his rights in property through the process of law.

Explaining the basis of this doctrine in *Bellamy v. Sabine*²⁴, Turner, L.J. observed:

"It is, as I think, a doctrine common to the Courts both of law and Equity and rests as I apprehend, on the foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be

driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceedings."

The Indian Courts have also taken the view that basis of Section 52 is not the doctrine of notice but expediency i.e. the necessity for final adjudication and public policy.²⁵ It has been held that "the foundation for the doctrine of *lis pendens* does not rest upon notice, actual or constructive; it rests solely upon necessity—the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponents."²⁶ In *Rajendar Singh v. Santa Singh*²⁷ the Supreme Court has said that the doctrine of *lis pendens* is intended to strike at attempts by parties to a suit to curtail the jurisdiction of the Court by private dealings which may remove the subject matter of litigation from the power of the Court to decide a pending dispute and frustrate its decree.

Since the Courts in India regard 'necessary' as the basis of the doctrine of *lis pendens*, it is immaterial whether the transferee had any notice of pendency of suit or not. The transferee is bound by the decision of the Court even if he had no actual or constructive notice of the pending suit.²⁸ In *Bellamy's* case cited above, Lord Cranworth said:

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

State Amendments in Gujarat and Maharashtra.—Section 52 of the Transfer of Property Act was amended by the Bombay Act, 1939. This amendment was subsequently declared to be in force in whole of the present States of Gujarat and Maharashtra in the year 1959. The amended version of Section 52 provides that this section is applicable only to those transactions pending litigation which are duly registered. However, Section 52 of the Bombay Act, 1939 provides that the amendment in Section 52 is applicable only to immovable properties situated wholly or partly in Greater Bombay but the State Government is empowered to extend its application to other areas by notification.²⁹

Provisions of Section 52.—The doctrine of *lis pendens* as laid down in Section 52 is as follows:

25. *Fajiz Hussain Khan v. Ping Narain*, (1907) 29 All. 389; 34 L.A. 102; *Adul v. Shreeji Rao*, A.I.R. 1937 Bom. 244.

26. *Gorinda Pillai v. Ayyappan Krishnan*, A.I.R. 1957 Ker. 10.

27. A.I.R. 1973 S.C. 2537; See also *Sanjay Verma v. Manik Roy*, AIR 2007 SC 1332 the mere pendency of a suit does not prevent one of the parties from dealing with the property which is the subject matter of the suit. The section only postulates a condition that any alienation would in no manner affect the rights of the party in whose favour a decree may be passed.

28. *Rajpal Arghwadi v. Gopalan*, A.I.R. 1970 Ker. 188; *Krishaji v. Anusayabai*, A.I.R. 1959 Bom. 475.

29. See *Mulla's Transfer of Property Act*, Ed. VII, p. 220 for text of the Bombay Act, 1939.

24. (1857) 1 De G & J 566 cited in *Stall's PRINCIPLES OF THE LAW OF TRANSFER*, Ed. III, p. 106.

- (a) During the pendency of a suit or proceeding.
- (b) property cannot be transferred or otherwise dealt with, and
- (c) if so transferred, the transferee is bound by the decision of the Court whether or not he had notice of the suit or proceeding.

Essential conditions for application of Section 52.—Following conditions are necessary for the application of the doctrine of *lis pendens* as provided in Section 52:

- (1) There is a pendency of a suit or proceeding.
- (2) The suit or proceeding must be pending in a Court of competent jurisdiction.
- (3) A right to immovable property is directly and specifically involved in the suit.
- (4) The suit or proceeding must not be collusive.
- (5) The property in dispute must be transferred or otherwise dealt with by any party to suit.
- (6) The transfer must affect the rights of the other party to litigation.

When the above-mentioned conditions are fulfilled, the transferee is bound by the decision of the Court. If the decision of the Court is in favour of the transferor, the transferee has rights in the property transferred to him. If the decision goes against the transferor, the transferee cannot get any interest in the property.

Pendency of suit or proceeding.—The section applies only where a property is transferred during pendency of litigation. Pendency of a suit is that period during which the case remains before a Court of Law for its final disposal. If a case is instituted in Court, the first step is presentation of the plaint, and the last step is passing of a decree. When the Court gives its decision by passing a decree, the case is terminated. So, the pendency of a suit begins from the date on which the plaint is presented and terminates on the date when final decree is passed. The Explanation to this section provides that pendency of suit or proceeding is deemed to begin from the date of presentation of the plaint or institution of the proceeding in a Court and continues until the suit has been disposed of by a final decree or order. However, mere presentation of plaint is not sufficient; the plaint must also be accepted by the Court. Where a plaint is presented in a Court having no jurisdiction and the plaint is returned to be filed in the Court having proper jurisdiction, the pendency would commence from the date on which the plaint is presented to another Court having proper jurisdiction. Transfer made during the interval between the first presentation of plaint (which was returned back) and the date of presentation thereof in a proper Court, is not affected by the doctrine of *lis pendens*.³⁰

Similarly, where a plaint is presented with insufficient Court fee and is therefore returned by the Court by the plaintiff presents it again by affixing proper Court fee, the pendency would begin from the date when it was presented second time with proper Court fee. Where an application is presented before a Court asking permission to sue in *forma pauperis*, the pendency starts from the date on which the application has been presented provided it is accepted by the Court.³¹ But, where such application is rejected, the pendency shall not commence from the date of application.³²

As regards termination of the suit or proceeding, the Explanation provides that pendency continues until the final decree or order in the suit or proceeding is completely satisfied or discharged unless execution of the decree has become time-barred. Execution proceedings are in fact part of the proceedings in a suit.³³ Therefore, the pendency continues till the decree is completely executed. In *N.C. Bhatia v. Gandhi Peoples Co-operative Bank Ltd.*,³⁴ an order of attachment of judgment-debtor's property was passed during execution proceedings. Subsequently, the relatives of the judgment-debtor objected the attachment and claimed a share in that property. They also sold that property and this sale-deed was executed during pendency of the execution proceedings. Criminal High Court held that the sale-deed was hit by the doctrine of *lis pendens* as given in Section 52. *Lis* (litigation) in a mortgage suit continues after the decree and does not terminate till the security is realised for the satisfaction of the decree. After a final decree, the defendant has a right to appeal within the period of limitation. Where an appeal is preferred within limitation period, the appeal would be a continuation of the suit and the *lis* shall be deemed to continue during appeal. Transfer of property made during appeal shall be a transfer during pendency of suit and the provisions of Section 52 shall apply on it.³⁵ It may be concluded that for purposes of this section pendency of a suit begins from the date of presentation of a plaint and continues up to the termination of litigation including appellate stage and execution proceedings. In *Supreme General Films Exchange Ltd. v. Sri Nithi Singhji Deo*,³⁶ a theatre (Plaza Talkies) was attached in execution of a decree against its owner. During attachment, the owner leased the theatre to M/s. Supreme General Films Exchange Ltd. It was held by the Supreme Court that the lease was hit by the doctrine of *lis pendens*.

The execution of a decree was challenged by the *lis pendens* purchaser. He was in possession of the suit property. The rights, title and interest of the decree holder in the property was affirmed up to the second appellate stage. The petitioner was a *lis pendens* alienee and therefore he was held to have acquired no title. He was not entitled to possession of the property particularly when the execution was pending. But he could file a suit under Section 144, CPC

31. *Nagubhai Annal v. B. Shama Rao*, AIR 1956 S.C. 593.

32. *Sahandrabai v. Shri Doo Lalibhai Bhatnagar*, AIR 1938 Nag. 30.

33. *Abdul Aziz v. District, Rampur*, AIR 1994 All 167; *Shantini Devi v. Shashikumar Bhatia*, AIR 2009 Pat 83, a preliminary decree was passed in a suit for partition, property alienated during pendency of final decree proceedings without taking prior permission of Court, the alienation was hit by Section 52.

34. AIR 2002 Cutt. 209.

35. *Chinteshwar Ghosh v. Madan Mohan Ghosh*, AIR 1997 S.C. 471, see also *Venkateswara Annalibhai Joshi and others v. Mahantji & others*, AIR 2003 S.C. 267.

36. AIR 1975 S.C. 1810.

after the decree holder recovered his possession. He could also enforce his right, if any, under the sale deed.³⁷

In a suit for recovery of the decretal amount by sale of the mortgaged land, there was objection by subsequent purchasers. The land stood mortgaged to a financial corporation. Any subsequent alienation of the mortgaged land thus hit by *lis pendens*. Such transferee could not taken to be a bona fide purchaser.^{37a} A suit or appeal remains pending till the decree is satisfied. A sale before payment of decree is hit by the doctrine of *lis pendens*.^{37b}

This section must be interpreted strictly. Any transfer made outside the period of litigation will not be affected by *lis pendens*. Where a society had already allotted the land in question to some persons before institution of the suit by the respondent society, the Court said that the doctrine of *lis pendens* was not attracted.³⁸ A sale-deed executed before but registered after presentation of the plaint is not affected by this section because deed operates from the date of its execution. But where the sale-deed is already registered the sale-deed would be affected by the doctrine of *lis pendens*. In *Suresh Singh v. State of Bihar*,³⁹ a registered sale-deed was executed in favour of the petitioner. The other party filed an application for pre-emption in terms of the earlier sale-deed in respect of the same property on the same date. The Court held that *Lis* about the claim for pre-emption would be deemed to be pending before Collector on date of the execution of sale-deed. Therefore, this sale-deed was hit by the doctrine of *lis pendens*. Accordingly the Court allowed the application for pre-emption by the other party.

Proceedings.—The doctrine of *lis pendens* applies to transfers during pendency of suit or proceeding. 'Proceeding' means a judicial activity whether civil or criminal. Here it means a judicial activity in respect of determining the rights in an immovable property. Accordingly, for purposes of this section, there is no difference between a suit and a proceeding. This section has been applied to transfers made during revenue proceedings.⁴⁰ A claim made under O. XXV, R. 58 of the Civil Procedure Code is a proceeding under this section.⁴¹ Similarly, proceedings for ejectment before Revenue Officer are affected by *lis pendens*.⁴² Since Registrar of Co-operative Societies is regarded as a Court, therefore, proceeding under Rule 14 of the Co-operative Societies Act, 1912 operates as *lis pendens*. But, proceeding before Settlement Officer is not a proceeding under this section and such proceeding cannot operate as *lis pendens*.⁴³

Compromise Suit.—The doctrine of *lis pendens* is applicable in cases where the pending litigation is ultimately compromised and a compromise or consent decree is passed.⁴⁴ The word 'decree or order' in this section contemplates compromise or consent decrees. However, the compromise must be

during the pendency of suit and not a compromise entered into after withdrawal of the suit.⁴⁵

In a case before the Supreme Court, two suits for specific performance of the agreement of sale of the same property were filed by the two purchasers and were pending. One of them was the appellant-purchaser before the Supreme Court. Both the purchasers were impleaded in each other's suit. The other purchaser entered into a compromise and a consent decree was passed in terms of the compromise. The appellant being not a party to the compromise was held to be not bound by the consent decree. The compromise was also hit by Section 52, TPA, and Section 19 of the Specific Relief Act, 1963. The Court could pass a discretionary order under Section 20 of the Specific Relief Act in the suit filed by the appellant. The case was remanded for this purpose.⁴⁶

Pendency of injunction order.—An injunction was granted by the Court before presentation of the plaint to the Court of competent jurisdiction. The Court said that such an injunction is not without any significance. The sale deed executed during its subsistence and in contravention of the order was held to be void.^{46a}

Pendency in Court of Competent Jurisdiction.—The suit or proceeding during which the property is transferred, must be pending before a Court of competent jurisdiction. Where a suit is pending before a Court which has no proper jurisdiction to entertain it, the *lis pendens* cannot apply. For filing a suit, the Civil Procedure Code has prescribed jurisdictions of the Courts on the ground of territory or on the basis of valuation of the subject-matter of dispute. The jurisdiction of the Court is, therefore, territorial or pecuniary or, otherwise as given in this Code. Thus, a suit respecting any immovable property should be filed only in the Court within whose jurisdiction the property situated. If the disputed property is situated outside the territorial limits of the Court, it has no competency to try any suit involving that property. Accordingly, the Court cannot pass a valid decree so as to affect a transfer made *pendente lite*. *Lis pendens* is not applicable where the suit is pending in any Court is outside the scope of this section.

However, as regards pecuniary jurisdiction, if a suit is filed in a higher Court which should have been filed in the lowest Court, it has been held that there is no lack of jurisdiction; it is merely an irregularity and Section 52 applies.⁴⁷

Right to immovable property must be involved.—Another condition for applicability of this section is that in the pending suit, right to immovable property must directly and specifically be in question. The litigation should be regarding title or interest in an immovable property. Where the question involved in the suit or proceeding does not relate directly to any interest in an immovable property, the doctrine of *lis pendens* has no application. For example, where a suit is pending between landlord and tenant regarding payment of rents and during litigation the landlord transfers the property, the transfer is not affected by *lis pendens* because the litigation is not with regard to any interest in the property but involves payment of rents. Similarly, where

37. *Sanjiva Sahoo v. Sanibada Mishra*, A.I.R. 2009 Ori. 62.

37a. *K. S. Dhillon v. Punjab Financial Corp.*, A.I.R. 2012 P & H 75.

37b. *S. Mishra v. Borka Vastheshwarrao*, AIR 2013 Kar 88.

38. *Mohammed Co-op. Building Society Ltd. v. Lakshmi Srinivas Co-op. Building Society*, (2008) 7 SCC 310.

39. A.I.R. 1994 Pat. 35.

40. *Natu Pathan v. Banthia Beml*, A.I.R. 1968 Orissa 36.

41. *Aurandi v. Lala Ram*, (1939) Oudh 178.

42. *Jiram v. Mulgiani*, (1948) Nag. 283.

43. *Vedagudi Mithili v. Co-operative Rural Credit Society*, A.I.R. 1954 Mad. 40.

44. *Sae Mohammed Akbar v. Masood Alam*, A.I.R. 1989 Raj. 43.

45. *Subramanian Chetty v. Mehar Ali*, 52 I.C. 624.

46. *Argu Singh v. Punit Ahluwalia*, AIR 2008 SC 2718.

46a. *Joshi Tanti v. Nageshwar Singh*, AIR 2013 SC 2235.

47. *Govind Pillai v. Appappa*, A.I.R. 1957 Ker. 10; *Madhushigh v. Anandram*, (1941) Nag. 652.

a Hindu widow filed a suit against her stepson for maintenance and specifics certain immovable properties in possession of such stepson, it was held that right to immovable property is not directly in issue and this section cannot apply.⁴⁸ Mere mention of an immovable property in the plaint is not enough, rights in respect of that immovable property must directly and substantially be in question. In a suit for specific performance of a contract to transfer an immovable property, the right to such immovable property is directly and substantially in question. Therefore, transfer of that property is within the scope of this section. The test whether a suit or proceeding involves any question of right in immovable property should be the nature of claim and the decree passed rather than the property mentioned in the plaint.⁴⁹ However, following suits have been held to involve question of rights in immovable property and are within the scope of this section:

- (i) A suit for partition.⁵⁰
- (ii) A suit on mortgage.⁵¹
- (iii) A suit for pre-emption.⁵²
- (iv) Easement Suit.⁵³

(v) Suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property.⁵⁴

Where the suit or proceeding does not involve any question of right in immovable property, *lis pendens* does not apply. Thus, (i) suit for debt or damages where the claim is limited to money, (ii) a suit for the recovery of movables, or (iii) a suit for an account are outside the scope of this section. Similarly, a suit for recovery of rents of an agricultural holding is also outside the scope of this section.

Rights in movables.—The doctrine of *lis pendens* does not apply where the suit involves rights in movable properties. Standing timber is a movable property; therefore, this section cannot apply where the issue before the Court is rights in respect of standing timber.⁵⁵ Similarly, where certain ornaments were pledged pending a suit for their recovery, it was held that *lis pendens* is not applicable and the pledge shall not be subject to decision of the Court.⁵⁶

Suit must not be collusive.—*Lis pendens* is inapplicable if the suit is collusive in nature. A suit is collusive if it is instituted with a *malafide* intention. *Malafide* intention behind instituting a suit is inferred from the fact that parties to the suit know their respective rights in the property and there is no actual dispute. Such suit is, therefore, fictitious and the very purpose of

filing the suit is to get judicial decision for some evil design, e.g. defrauding a third party. Explaining the nature of a collusive suit, in *Nagbati v. B. Shahu Rao*⁵⁷, the Supreme Court said:

"In such (collusive) a proceeding the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the semblance of a judicial determination and worn by the parties with the object of confounding third parties."

Since such suits are instituted with a *malafide* intention of causing injury to a third person, there is no question of its being a litigation involving rights in an immovable property. Where property is transferred during pendency of a collusive suit, the transferee is not bound by the result of the litigation. However, it is impossible that a suit in the beginning is *bona fide* but during pendency there is a secret agreement between the parties in the form of a compromise. In such cases too *lis pendens* is inapplicable. A Hindu wife filed a maintenance suit against her husband with a secret agreement that during litigation the husband would transfer the property. During the pendency of the suit, the husband sold the property. Later on, a charge was created in favour of the wife over the property. It was held by the Privy Council that the suit was collusive in nature and was, therefore, outside the scope of *lis pendens*. Accordingly, the Court held that the purchaser was not bound by the Charge on the property.⁵⁸

Illustration.—A is owner of a house which is in possession of B. A and B secretly agree that B shall declare himself as owner of the house whereupon A shall file a suit against him (B). It is further agreed between them that during litigation B would sell the house and the price shall be divided equally between them. Both are sure that since the Court shall determine the ownership on merit A would retain the house and the sale by B shall be declared void and the purchaser can never get the house. With such fraudulent intention A files suit against B objecting B's claim of ownership. During pendency of the suit B sells the property to C. After sometime the Court gives its judgement in favour of A and it is held that B has no right of ownership in the house which he (B) had sold to C. Since the suit between A and B was collusive, C is not bound by the decision of the Court. Accordingly, the transfer in his (C's) favour would not be invalidated.

Property is transferred or otherwise dealt with.—During pendency of suit, the property must be transferred or otherwise dealt with by any of the parties to suit. "Transfer" includes sale, exchange, lease and mortgage. Thus, during pendency of suit if the disputed property is sold or given in exchange, is leased or is mortgaged either by plaintiff or by defendant, the doctrine of *lis pendens* shall apply on it and the transfer would be subject to decision of the Court.

The expression "*otherwise dealt with*" has been interpreted to mean those transactions in which although there is transfer of some interest in the property but they do not come strictly within the meaning of 'transfer of property' as

48. *Manila Ganani v. Ellappa*, (1896) 19 Mad. 271.
49. *Mahesh Prasad v. Munshor*, A.I.R. 1951 All. 141.
50. *Jogindran Nath v. Devedra Nath*, (1898) 26 Cal. 127; *Channulcher Ghosh v. Madan Mohan Ghosh*, A.I.R. 1997 S.C. 471.

51. *Fariqaz Hussain Khan v. Prag Narain*, (1907) 29 All. 339.

52. *Madho Singh v. Skinner*, A.I.R. 1941 Lah. 433.

53. *Kamathuram v. Anthonim*, A.I.R. 1955 Andh. 199.

54. *Indl.*

55. *Kumathi Koya v. Ahmed Kutlu*, A.I.R. 1950 Mad. 59.

56. *Garud Bala v. Jyoti*, (1912) 36 Bom. 189.

57. (1956) S.C.R. 451.

58. *Gauri Datta v. Shanthi Mohammad*, A.I.R. 1948 P.C. 147; *Bhagwan Bai v. Chinnaji Lal*, AIR 2009 NOC 1701 (P & H), the decree which was under execution was the result of a collusive suit. The Court has to adjudicate upon this fact.

defined in Section 5 of this Act. Accordingly, surrender,⁵⁹ release or partition would be regarded as transfer for purposes of this section. A contract of sale has been regarded as a transfer within the meaning of 'otherwise dealt with'. Therefore, entering into contract of sale of the disputed property during litigation shall attract the provisions of this section.⁶⁰ Partition effected during pendency of the suit shall also come within the ambit of this section.⁶¹ Handing over of the disputed property during litigation would mean 'otherwise dealt with' and Section 52 applies. However, in *Rajendra Singh v. Santia Singh*,⁶² the Supreme Court has held that taking illegal possession or continuance of wrongful possession of the disputed property does not amount to 'otherwise dealt with' and, therefore, it shall not attract the provisions of Section 52 even though the wrong doer is party to suit.

To construct building on the disputed land so as to compel the plaintiff to file another suit for its removal is dealing the property otherwise and comes within the purview of Section 52.⁶³ Entering into a compromise respecting disputed property with a third person during litigation is also dealing the property otherwise.⁶⁴

Involuntary transfers.—Transfer of property may either be by act of parties or by operation of law. Transfers by operation of law are known as involuntary transfers e.g. Court sale or transfer made by order of Court. Section 52 is applicable to both the kinds of transfers *pendente lite*. Formerly there was some doubt whether this section applies to transfers made by operation of law because this Act does not apply to such transfers. But the Privy Council had settled the law that the principle of *lis pendens* is applicable also to transfers by operation of law.⁶⁵ In *Samarinda Nath Sahu v. Krishna Kumar Nagesh*,⁶⁶ the Supreme Court has also held that it is true that Section 52 strictly speaking does not apply to involuntary alienations such as Court sales but, it is well established that the principle of *lis pendens* applies to such transfers. Therefore, the doctrine of *lis pendens* applies where the sale is made by order of the Court. Though an attachment is not a transfer, but a sale in pursuance of an attachment comes within the scope of this section.⁶⁷ The principle of *lis pendens* applies to execution sales as well as sales for non-payment of Government revenue.⁶⁸ The auction-purchaser is bound by the decision of the pending litigation though auction is made by Court's order. Purchaser at a sale for arrears of income-tax is affected by the rule of *lis pendens* and would be bound by the decision of Court if he had purchased the property pending

litigation.⁶⁹ Lease effected by Government in *Kims unhal* is regarded as lease by the landlord and if made *pendente lite*, Section 52 is applicable on such a lease.⁷⁰ In *Sujan Bhan v. Gaj Rai*,⁷¹ a suit for specific performance of a contract for the sale of an immovable property was pending in a Court. The property was purchased under an auction sale in execution of decree in suit filed on the basis of a promissory note. The Allahabad High Court held that the execution sale would be hit by the provisions of Section 52 and no title could be given to the purchaser.

Transfers with permission of Court.—When a transfer is made during pendency of suit with the permission of Court, the principle of *lis pendens* is not applicable. The concluding part of this section exempts transfers *pendente lite* if such transfer is made 'under the authority of the Court and on such terms as it may impose'. Under this clause, the parties to suit are entitled to apply to the Court in which the suit is pending to get permission for the transfer. If the Court deems it fit, it may give permission for the transfer of disputed property. In such a situation, Section 52 shall not apply on the transfer of disputed property. In such a situation, Section 52 shall not apply on the transfer though it is made during pendency of suit.

Transfer by any party to suit.—Transfer made during pendency of suit is not enough to attract the provisions of this section. It is necessary that transfer of disputed property is made by any party to suit. Transfer of property by a person whose title is not in any way connected with disputed property is not affected by *lis pendens*. A party to suit whose name is struck off as a contesting party by consent is not bound by the decree because *lis pendens* shall not apply to him.⁷² It is to be noted that the words 'any party' are not merely descriptive but refer to the time when the transaction takes place.⁷³ The doctrine of *lis pendens* was, therefore, not applied where the transfer was made pending the suit by a person who was not party at the time of transfer but, was subsequently made a party as a representative of the original defendant.⁷⁴

In a case before the Supreme Court, the owner of the property who was a party to the suit sold the property to a second purchaser. This sale was effected after the first vendee had filed a suit for specific performance of the sale to him. The Court said that the principle of *lis pendens* was to apply notwithstanding the fact that the right of the subsequent purchaser could be protected under Section 19 (b) of the Specific Relief Act, 1963.⁷⁵

Transfer affects rights of any other party.—The last condition for applicability of Section 52 is that the transfer during pendency must affect the rights of any other party to suit. The principle of *lis pendens* is intended to safeguard the parties to litigation against transfers by their opponents. So, the words 'any other party' here does not mean stranger to suit. It means any other party between whom and the party who transfers, there is an issue for decision which might be prejudiced by alienation.⁷⁶ 'Any other party' here means the

59. But according to Patna High Court surrender of her reversionary rights by a Hindu widow is not transfer for purposes of this section. *Usha Misir v. Prady Misir*, AIR 1958 Pat 1151.
60. *Kulraj Bhat v. Kishorji*, (1917) 38 I.C. 582.
61. *Lakshminani v. Kandi*, AIR 1958 Ker. 67; *Bhargavati Narayan v. Taravaji*, AIR 1950 Ass. 119.
62. AIR 1973 S.C. 2537.
63. *Narain Singh v. Jagan Chiu*, (1943) Lah. 978.
64. *Hazari Singh v. Bala Kishor*, (1922) 3 Lah. 264.
65. *Nitiani v. Suresh Chander*, (1885) 12 Cal. 414, 12 I.A. 171; *Motilal v. Karanbhai*, (1897) 25 Cal. 179, 24 I.A. 170.
66. AIR 1967 S.C. 1410.
67. *Sure Shankarappa v. Shimpappa*, (1943) Bom. 27.
68. *Ashwini Prasad Sahu v. Dason Sahu*, (1922) Pat.512.
69. *Kulraj Mohan v. Mathu Krishna*, 26 Mad. 230.
70. *Secretary of State v. Lal Mohan*, (1935) Cal. 746.
71. AIR 1961 All. 149.
72. *Mahabodhi Aloni Khan v. Kishorji*, AIR 1966 S.C. 1194.
73. See *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VII, p. 239.
74. *Bala Ram Bhatn v. Dhiru*, 27 Bom. L.R. 38.
75. *Guruswamy Nand v. P. Lakshmi Ammal*, AIR 2008 C 2594.
76. *Pillayanth v. Bonimirell*, AIR 1949 Mad. 904.

opposite party whose interest may be affected by transfer *pendente lite*. Where the rights only of the transferor and not of the other party to suit are affected, the principle of *lis pendens* does not apply.⁷⁷ Thus, Section 52 cannot be made applicable between parties who are at one side either as plaintiff or as defendant because there is no question of any dispute between them. For example in a suit A is plaintiff and B, and C are co-defendants. During pendency of the suit B transfers the property. C cannot take the benefit of Section 52 because there is no dispute between B and C. But A can take the benefit of this section because he is party to suit other than the transferor and his rights may be affected by the transfer *pendente lite*.

Effect of the principle of *lis pendens*.—When the condition necessary for the applicability of this section are fulfilled the result is that transferee is bound by the decision of the Court. For example, in a suit between A and B respecting title of a house if B transfers the house to C during pendency and the judgment is subsequently in favour of B, then C would be entitled to the house. But if the decree is passed against B, then it is binding not only on B but also on C with the result that C cannot get the house. Under this section C cannot take the plea that he had no notice of pending litigation. It may be noted that normally decree of a Court binds only the parties to the suit. But, under the principle of *lis pendens*, a person who purchases during pendency of the suit is also bound by the decree made against that party from whom he had purchased.

The effect of *lis pendens* is, therefore, that it does not prevent the vesting of title in the transferee but only makes it subject to the rights of the parties as decided in the suit.^{77a} Section 52, therefore, does not invalidate the transfer but renders it subservient or subject to the rights of the parties to litigation. The words 'so as to affect the rights of any other party thereto under any decree or order which may be made the *cin*' suggest that the transfer *pendente lite* is valid and good to the extent that it might conflict with rights established under the decree.⁷⁸

Where the assignee of a decree was neither impleaded in the first appeal, nor in the second appeal, it was held that he was nevertheless bound by the result of the second appeal and could reap the benefit of the decree for possession passed in the second appeal.⁷⁹

Purchase of property during continuance of a prohibitory order of the Court has been held to confer no right or title on the purchaser.⁸⁰

77. *Sri Pal Singh v. Narsish*, (1925) Pat. 239.

77a. *Thomson Press (India) Ltd. v. Naniak Builders and Investors P. Ltd.*, AIR 2013 SC 2389. The doctrine does not annul the transaction. It merely makes such transfer subject to the resulting rights of the parties after the decision. *K. N. Asanthiraman Selly v. State of Karnataka*, AIR 1914 SC 279, to the same effect.

78. *Sreenivasan v. Peter Idnani*, AIR 2008 SC 2052 : (2008) 12 SCC 316, during pendency of suit, agreement made for sale of property, the agreement holder sold it to a third party. A suit for specific performance was filed against the agreement holder. A further sale was made by third party during the suit, held, not invalid. The seller was impleaded subsequently, the deemed date of commencement of the suit, so far as he was concerned, was the date of service of summons on him. He had effected the transfer before that date.

79. *But Krishna Varma v. 6th Addl. D.J.*, AIR 2008 NOC 1898 (All).

80. *Pratijno Narayan Prasad v. Kamalamb Dulchind Sircar*, AIR 2008 NOC 1412 (Bom).

Impleadment of *lis pendens* transferee.—The suit was for eviction, recovery of arrears of rent and *mesne profit*. During the pendency of the suit, the plaintiff sold her right, title and interest in the property. After such sale, the plaintiff did not pursue the suit and abandoned it. It was held that impleadment of the *lis pendens* transferee had become necessary for the purpose of ensuring effectual adjudication and avoidance of multiplicity of litigation.^{80a}

Such impleadment is not necessary in all cases. In a family partition suit, a preliminary decree was in favour of a co-sharer to the extent of his entitlement. Final decree proceedings were still pending. He entered into partnership with the petitioner bringing in his share. The petitioner thus became a *pendente lite* transferee without leave of the Court. It was held that he was not entitled to seek impleadment in final decree proceedings as a matter of right. The rejection of the application was proper.^{80b} A purchaser *pendente lite* has to be given an opportunity to defend his right. He can be added as a proper party if his interest in the subject-matter of the suit was of substantial nature. Such purchaser can get only the rights and obligations of his vendor in the property as may be eventually determined by the Court. His coming up with a separate suit to enforce his right would mean multiplicity of proceedings. He would be entitled to be impleaded in the title suit or other proceedings where his predecessor in interest was made a party to litigation.^{80c}

Whether impleaded or not, *lis pendens* transferee becomes bound by result of the litigation one way or the other. Such transfer is void as against the successful plaintiff. A *pendente lite* transferee is as much bound by the decision as the parties to litigation even if not impleaded. Such transferee cannot claim protection under Section 52, Transfer of Property Act by raising objections under Order 21, Rule 77 of the Civil Procedure Code, 1908.^{80d}

53. Fraudulent transfer.—Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

80a. *Shivan Construction P. Ltd. v. Babith Molanthy*, AIR 2010 Or 65.

80b. *Nagamma v. Govindan*, AIR 2013 Kant. 137.

80c. *Bhimnani Sahu v. State of Orissa*, AIR 2013 Or 52.

80d. *Haji Abdul Mokov v. Sheikh Haji Ferozuddin*, AIR 2014 Del. 111.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

SYNOPSIS

- Fraudulent Transfers—Principle.
- Characteristics of Fraudulent Transfers.
- Transfer of immovable property.
- Partition.
- Sham transfers.
- Immovable property.
- Fraudulent transfer to defeat or delay creditor.
- Intent to defeat or delay.
- *Musahur Sahu v. Hakim Lal*.
- Preference to one creditor.
- Transfer is voidable at the instance of creditors.
- Representative suit.
- Attaching creditor.
- Burden of proof.
- Exceptions to S. 53(1).
- Transferee in good-faith for consideration.
- Right created under insolvency laws.
- Section 53 (2) : Gratuitous transfer to defraud subsequent transferee.

FRAUDULENT TRANSFERS

Principle.—Every owner of property has right to transfer his property as he likes. But, the transfer must be made with a *bona fide* intention. Where the transfer is made with a fraudulent intention e.g. with the intention of defeating the interest of creditor or interest of any subsequent transferee. Where the transfer is made with fraudulent intention, the object of the transfer would be bad in the eyes of equity and justice though it is valid in law. Since fraudulent transfers are otherwise valid in law, they are not void. But, because they are made with *mala fide* intention, equity would render it voidable by the person who was so defrauded. Equity, therefore, does not allow a person to alienate his own property when such alienation tends to delay or defeat the interest of his creditor or any subsequent transferee. This principle of equity has been incorporated in Section 53 of the Transfer of Property Act. Law relating to fraudulent transfers as given in this section has two parts. The first part provides that a transfer with an intent to delay or defeat the creditor of the transferor shall be voidable by such creditor. The second part of this section provides that a gratuitous transfer with intent to defraud a subsequent transferee is voidable at the option of such transferee. For instance, A is owner

of a house. He takes a loan of Rs. 10,000/- from B. Thus, A is debtor and B is creditor. House is the only property through which B can recover his loan. B intends to do so but A becomes aware of B's intention and before B could take any action A sells the house to C, who knows that A is selling the house so that B could not get back his money. The sale of the house is a fraudulent transfer and is voidable by B whose interest has been defeated.

Section 53(1) : Fraudulent Transfers.—Section 53 (1) provides that—

- (i) Transfer of an immovable property,
- (ii) made with intent to defeat or delay the creditors of the transferor,
- (iii) shall be voidable at the option of the creditor so defeated or delayed.

But the provisions of this sub-section shall not affect—

- (a) the rights of a subsequent transferee in good faith, for consideration, and
 - (b) any law for the time being in force relating to insolvency.
- Characteristics of Fraudulent Transfers.**—The essential conditions for the applicability of Section 53 (1) are :

1. There is transfer of immovable property.
2. The transfer is fraudulent i.e. made with an intent to defeat or delay the creditors of the transferor.

When the above-mentioned conditions are fulfilled, the transfer of property is avoidable by the creditor or creditors whose interest has been defeated or delayed.

Transfer of Immovable Property.—There must be a valid transfer of immovable property. For applicability of this section, it is necessary that there is a transfer of property and such transfer is valid and enforceable so that property vests in the transferee. Section 53(1) does not apply where the transfer is in itself void. This section makes a valid transfer void at the option of creditor after the property had already vested in transferee. A suit under this section must accept the validity of the transfer first and then proceed to get it invalidated if it is proved to be fraudulent. In other words, the transfer under this section must be perfectly valid till it is declared void under this section by a defrauded creditor.

This section is applicable only where the transaction is a transfer of property within the meaning of Section 5 of the Act. Relinquishment is not transfer of property. Therefore, relinquishment of share by one co-parcener in favour of the other is not a transfer of property within the meaning of this section and Section 53 in terms does not apply.⁸¹ Similarly, this section is inapplicable to surrender. But, surrender by a life-estate holder has been held to be a transfer under this section.⁸² Dissolution of partnership is also not regarded as a transfer, therefore, a deed of dissolution of partnership was no held transfer and this section was applied.⁸³

81. *Sunder Lal v. Gursaran Lal*, AIR 1938 Oudh 65.

82. *Nath v. Dhunbaji*, (1899) 23 Bom. L. Chittambarn v. Sankaraya, AIR 1965 Mad. 337.

83. *Isimoor Dass Hem Raj v. Radha Mal Arjun Dass*, AIR 1960 Patn. 417.

A deed of gift executed with the object of making the property inalienable and beyond the reach of creditor was held to be a transfer which falls within the meaning of this section.⁸⁴ It may be noted that this section does not in any way violate the rule of Muslim Law because under Muslim Law too a person cannot constitute *naf* of his entire property without payment of debts. Where a settlement provided for an appointment and the appointment was made for the purpose of delaying or defeating the interest of the creditor, it was held that the appointment under the settlement was fraudulent transfer.⁸⁵

Partition.—Partition and family settlement are not transfer under this Act. Therefore, this section may not apply to partition or family settlement. However, if the object of partition is merely to defraud creditors it may be regarded as 'transfer' under this section. Where a partition was made not as normal allotment of shares in family-property but to allot the shares in such a manner that property given to a sharer was to be kept only for himself and thereby that share was placed beyond the reach of creditors, the partition was held a fraudulent transfer.⁸⁶ A partition was made in such a way that father was not given any share in property and the whole property was allotted to sons with a direction that they shall pay father's debt. It was held that the partition was a transfer within the meaning of this section. The partition was therefore, declared void at the instance of the creditor. Accordingly, it may be stated that though partition is generally not a transfer but if it is effected with *malafide* intention to defraud the creditors, it comes within the scope of this section.

Sham transfers.—Sham transfer means fictitious transfer. A transfer is fictitious when the transferor does not intend that property should really vest in the transferee. Such transfers are therefore unreal or colourable transfers and are never meant to operate between the parties. The transferor may transfer a property in favour of transferee only for name's sake *i.e.* in the false name of transferee. Such transfers are, therefore, unreal or colourable transfers and are not made to operate between the parties. *Benami* transaction is also a sham transfer because the real owner has no intention that property should belong to ostensible owner.

Sham transfers *e.g.* a *benami* transfer is not 'transfer' as contemplated by Section 53. Thus, fictitious or *benami* transfers are outside the scope of this section. Section 53 safeguards the interest of a creditor in case of only real transfer which is made with a fraudulent intention. On the other hand, a sham transfer is actually not a real transfer at all; the intention of the real owner is not necessarily fraudulent. Therefore, such fictitious or sham transfers do not require to be avoided because the real title already vests in the transferor.⁸⁷

Where a transaction results in rights and obligations, it can never be treated as a sham transaction.⁸⁸

However, whether a transfer is real or sham, is to be determined on the basis of facts and circumstances in each case. In certain cases where it is fully established that the very object of transfer is to defeat the interest of creditors, the transfer can be avoided by the creditor under this section. In *Keshab Chandra Nayak v. Laxmidhar Nayak*,⁸⁹ it was held by the Orissa High Court that reference to Section 53(2) of this Act shows that in certain situations, a sham transfer can also be treated as voidable at the instance of some persons and they may approach the appropriate authority for getting it so adjudged and its cancellation.

It is significant to note that now the Benami Transaction Act, 1988 provides that properties purchased in the name of ostensible owner or *benamidar* shall belong to such *benamidar* and real owner cannot recover it from him. In essence, this Act now treats *benami* transaction as real transfer under which the *benamidar* becomes real owner. However, Section 3 of the Benami Transactions Act, 1988 provides that nothing contained in this Act shall affect the provisions of Section 53 of the Transfer of Property Act or any law relating to transfers for illegal purposes.

Immovable property.—Section 53(1) is applicable to transfers only of immovable properties. The provisions of this section do not apply to a transfer of movable property. However, the principles laid down in this section have been applied by the Privy Council to fraudulent transfer of movable property on the ground of equity, justice and good conscience.⁹⁰ The principles of equity incorporated in this section were applied also to a case of assignment of a decree where it was found that major part of the consideration amount was secretly reserved for the benefit of the assignor.⁹¹

Fraudulent transfer to defeat or delay creditor.—The transfer which can be avoided by the creditor under this section must be with an intent to defeat or delay the interest of the creditors of the transferor. In other words, the transfer is made with the sole object of defeating or delaying the interest of creditors rather than to give the property to transferee honestly.

Intent to defeat or delay.—A transfer made with an intent of either defeating or delaying the interest of creditor is a fraudulent transfer. The only interest of a creditor in the debtor's property is that he can recover his money from that property in case the debtor fails to repay, it personally. So, where a debtor transfers his property before creditor makes any attempt to realise his debt from that property, it would no longer be debtor's property. In this manner the interest of the creditor would be defeated. Whether a transfer has been made with intent to defeat or delay creditors, is a mixed question of law and facts. Decision of fraudulent intention of the transferor must be taken after considering the facts of the case and the circumstances in which the transfer was made. There is no specific criterion to ascertain the fraudulent intention of

84. *Alamul Hussain v. Kalia*, AIR 1979 All 277.

85. *Jashwan v. Alimuz Bank*, (1889) 22 Cal 185.

86. *Vinayak v. Marudham*, AIR 1944 Nag. 44; *Ratnam Devi v. Jagdish Mal*, AIR 1956 Punj. 46.

87. *Vinayak v. Marudham*, AIR 1983 Cal. 126.

88. See also *Sachidan v. Asanul Rajput*, AIR 1983 Cal. 126.

89. *Jagdish Tripathi v. Bishan Tripathi*, AIR 1982 All 316; *Mahabhar v. Suraj Kumar*, AIR 1958 Pat. 568.

90. *Sundaram Chatterji Bank v. Andhra Bank Financial Services Ltd.*, (2006) 6 SCC 94.

89. AIR 1993 Orissa 1.

90. *Abdul Hye v. Mir Mohammad*, (1883) 10 Cal. 616, 11 LA. 10.

91. *Chidambaram v. Srinivas*, (1914) 37 Mad. 227; 23 L.C. 714 P.C.

transferor. But inference of such intention may be drawn from some broad considerations. In *Murugummal v. Thygarajah*,⁹² the Madras High Court rightly observed thus:

"The factors which constitute a fraudulent conveyance must necessarily depend upon the circumstances of each case. But certain broad *indicia* have been formulated in England, America and India. It is surprising how human nature is the same all the world over irrespective of colour, creed and race."

Accordingly, where the debtor sells all his properties after the decree to a purchaser who is in the knowledge of his debts, it may be presumed that the transferor (debtor) has a fraudulent intent to defeat or delay his creditor. Such presumption may be more strong if there is evidence that no price has actually been paid by the purchaser. Where the transferee shares the fraudulent intent and actively aids and assists the transferor in fulfilling his intention of defrauding the creditor, there is no doubt that the transfer was made to defeat the interest of the creditor.⁹³ Where a judgment-debtor who was a Muslim transferred his property to his wife saying that it was in lieu of her dower and the transfer was made soon after the attachment of his properties in execution of decree against him, it was held that the transfer was fraudulent.⁹⁴

Fraudulent intention must be proved by direct or circumstantial evidence and every case must be examined in the light of surrounding circumstances. However, following circumstances may give a strong presumption that the transfer was fraudulent:

- (i) The transfer was made secretly and in haste.
- (ii) The transfer was made soon after the decree was passed against the judgment-debtor.
- (iii) The transferor who was indebted alienated substantially the whole property e.g. gift of all the properties before the attachment.
- (iv) The consideration was very small amount in comparison of the real value of the property transferred.
- (v) There is evidence that there was no actual payment of consideration as shown in the sale-deed.

These are, however, some of the circumstances in which inference of intent to defeat or delay creditors may be drawn. Every case under this section would depend upon its own facts and circumstances and in all cases it is a matter of fact whether the transfer is *bona fide* or fraudulent.

Preference to one creditor.—If there are several creditors, transfer in favour of one creditor does not amount to an intention to defeat or delay the

92. A.I.R. 1958 Mad. 580.

93. *Saroj Ammal v. Sri Venkateswara Finance Corpn.*, A.I.R. 1939 N.O.C. 4 (Mad).

94. *Gokul Chind v. Khanam Nur*, (1936) Pesh. 216. Under Muslim law, on marriage every husband

has to pay some money or property to wife as dower. Unpaid dower is debt.

remaining creditors. A debtor is entitled to pay his debts in any order of preference. For example, A, who has taken loan from B, C and D, transfers certain properties to B in satisfaction of the loan taken from him (B). This transfer is not necessarily with intent to defeat or delay the interest of remaining creditors C and D. It has been held by the Privy Council that in case there are two or more creditors, "a debtor, for all that is contained in Section 53 of the Transfer of Property Act may pay his debts in any order he pleases and prefer any creditor he chooses."⁹⁵ In *Chogmal Bhandari v. Deputy Commercial Tax Officer, Kurmool*,⁹⁶ a deed of settlement was executed allegedly to evade the payment of sales-tax, but there was no sales-tax order against the author of the settlement deed. The Supreme Court held that the fact that a debtor prefers one creditor does not lead to an inference that the intention was to defeat the other creditor (Sales-Tax Department).

It is significant to note that the word used in this section is 'creditors' not 'creditor'. Therefore transfer must be to defeat or delay the creditors in general and not to prefer one creditor to another. In *Musahur Sahu v. Hakim Lal*⁹⁷ is a leading case on this point. Facts and the law laid down by the Privy Council in this case is given below:

Musahur Sahu v. Hakim Lal.—Kisun Binode was debtor and Musahur Sahu was creditor. In December, 1900 the creditor Musahur Sahu sued the judgment-debtor Kisun Binode for recovery of his debts. During pendency of this suit, in January, 1901, Musahur Sahu presented a petition before the Court for attaching properties of the debtor by way of security. In February, 1901 Kisun Binode, the debtor gave an affidavit that he did not intend to transfer any of his properties whereupon the petition for attachment was dismissed. But, despite his affidavit Kisun Binode (debtor) sold his properties to Hakim Lal who was another creditor of Kisun Binode. Musahur Sahu the plaintiff (appellant) pleaded that since the transfer of properties by his debtor Kisun Binode were made with intent to defeat or otherwise delay his interest, it should be held void under Section 53 and Hakim Lal should not be given properties transferred to him.

Decision.—The Privy Council dismissed the appeal and held that transfer of property by a debtor to one creditor in preference of the other is not a fraudulent transfer with intent to defeat or delay the interest of another creditor.

Their Lordships observed that the transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The Court further observed that 'so soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine

95. *Mina Kumari v. Bijoy Singh*, A.I.R. 1916 P.C. 238; *Union of India v. Rajeshwari & Co.*, A.I.R. 1986 S.C. 1748.

96. A.I.R. 1976 S.C. 656.

97. (1915) 43 Cal. 521, 32 I.C. 343 P.C.

debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy.

Creditors.—Word creditor as used in this section, means any person who is entitled to get a certain sum of money from the other called debtor. Thus, a person who has given some loan to another is creditor of that other person. It includes not only those persons who have already obtained a decree in their favour from the Court but also includes persons who have a claim to be established by Court. A person who has sold goods to another but could not recover its price is also a creditor within the meaning of this section. Under Muslim Law dower is that sum of money or property which every husband must pay to his wife. Unpaid dower is therefore a debt. Until the dower debt is paid, wife is creditor and husband is debtor. Similarly, a deserted Hindu wife in her claim for maintenance is a creditor.⁹⁸ But, a person claiming only an undivided (uncertain) sum for damages for tort or breach of contract is not a creditor.⁹⁹

Transfer is voidable at the instance of creditors.—When a transfer is proved to have been made with intent to defeat or delay creditors it is voidable by creditors. Section 53 does not as such make a fraudulent transfer void. It remains a perfectly valid transfer until the creditors exercise their right to avoid the transfer. Since the right to avoid the transfer is *optional*, a creditor may or may not exercise his right under this section. Where creditors do not prefer to avoid the transfer, the transfer shall continue to be a valid transfer under which the property has already vested in the transferee. Moreover, under this section only creditors are entitled to avoid fraudulent transfer. Transferor or transferee or any other person has no such right.

Representative Suit.—It is provided in Section 53 (1) that a suit instituted by a creditor under this section must be instituted on behalf of, or for the benefit of, all the creditors. Accordingly, a creditor's suit to avoid a fraudulent transfer must be a suit not only for himself but on behalf of all creditors of the transferor. That is to say, any one creditor represents other creditors. The purpose of this rule is to protect the debtor from multiplicity of suits by other creditors. However if there is only one creditor whose interest has been defeated or delayed by fraudulent transfer, he can file that suit as a single creditor.¹ It may be noted that where there are two or more creditors, although a creditor is not entitled to file a suit only for himself but he cannot be compelled to defend such suit on behalf of all creditors.²

Attaching Creditor.—Creditors may protect their interests not only by avoiding the transfer under Section 53 but also by another method. They may do

it by attaching the property transferred. In *Abdul Shukoor v. Arji Papa Rao*³ the Supreme Court observed that attaching the property which debtor has transferred fraudulently, is sufficient evidence of his intention to avoid the transfer. No separate suit under Section 53 is necessary. Where a creditor is proceeding against the property of the debtor by way of attachment and the transferee is putting forth claim, it is not essential for the attaching creditor to file a fresh suit for challenging the transfer as fraudulent.⁴

It is to be noted that also in view of the amended provisions of O. 21, R. 58 of the Civil Procedure Code, the question of filing a separate suit is barred and all questions relating to title or interest in respect of the attached property are to be decided and adjudicated only in the claim proceedings and not by any separate suit.

Burden of proof.—The burden of proof lies on the creditors to show that the transfer was made to defeat or delay their interest. When they have proved on the basis of facts which *prima facie* show that the transferor intended to defraud the creditors, the burden shifts on the debtors to explain the facts and prove that it was not fraudulent.⁵ However, the decision of the Court must not rest only on suspicion howsoever doubtful the transfer might be. The decision that the transfer was fraudulent must be taken by the Court on legal grounds established by legal testimony.⁶

Exceptions to Section 53(1).—Section 53 (1) recognises two exceptions. The rule that a fraudulent transfer can be avoided by creditors, is *not applicable* to :

- (a) a transferee in good-faith for consideration, and
- (b) any law relating to insolvency for the time being in force.

Transferee in good-faith for consideration.—A transferee who takes property in good-faith for consideration is protected. Where a transferee has purchased the property in good-faith from a debtor, the creditors cannot avoid the sale under Section 53 (1). Good-faith has not been defined in this Act. But, the generally accepted meaning which is given to this term is that, 'an act is done in good-faith if it is done honestly whether it is done negligently or not'. Where a transferee has no knowledge i.e. no actual or constructive notice of the fraudulent intention of the transferor (debtor), the creditors cannot avoid the transfer under this sub-section even if they prove fraudulent intent of the debtor.⁷ But, where transferee is aware of fraud or aids and takes part in transferor's fraudulent dealings, he cannot be said to have acted in good-faith. Knowledge and *mala fide* intention of the transferee are determining factors. Where the transferor's intention was to convert his immovable property into

98. *Meevashil Ammal v. Ammani Ammal*, A.I.R. 1927 Mad. 657.

99. *Mulla*; TRANSFER OF PROPERTY ACT, Ed. VII p. 261.

1. *Union of Indian v. Rani Parry Devi*, A.I.R. 1984 Cal. 215.

2. *Ramanath v. Alagappa*, A.I.R. (1956) Mad. 682.

3. A.I.R. 1963 S.C. 1150.

4. *Amnethu Ammal v. Chinnaswamy Reddin*, A.I.R. 1989 Mad. 311.

5. *Abdul Shukoor v. Arji Papa Rao*, A.I.R. 1963 S.C. 1150.

6. *Mini Kumari v. Bijoy Singh*, AIR 1916 PC 232; *Chandrup Singh v. Adli Member, Board of Revenue*, AIR 1978 Pat. 148; *Chandram Kaur v. Sufiham Singh*, AIR 2013 P & H 42, a claim through adverse possession could not be perfected, revenue records showed permissive tenancy, no proof of adverse possession.

7. *Durga Ram v. Nadir Chaudh*, (1954) Lah. 318.

Cash so as to put it out of the reach of his creditors and the purchaser was aware of that intention, it was held that purchaser was party to fraud and the sale was voidable by creditors.⁸ If the purchaser had no knowledge of fraud, the sale is valid and cannot be avoided.

The interest of transferee in good-faith has been protected only where he has paid consideration. Consideration here means pecuniary consideration as defined in the Indian Contract Act. Natural love and affection is therefore not consideration. Dower-debt has been regarded as a valid consideration, therefore, transfer of properties by a Muslim husband to his wife in lieu of unpaid dower is a good consideration under this section and cannot be avoided by the husband's creditors if made in good-faith. In *Kapini Coundan v. Saranganapani*⁹ a man who had taken large sum of money as loan, transferred his whole property to the children of his first wife in 'consideration' of her relations allowing him to marry a second wife. In this interesting case, the Madras High Court held that this was a good consideration and transfer was not a fraud on the creditors. It is submitted that this decision must be regarded as only an exception and should not be regarded as a general rule.

Good-faith on the part of transferee is more significant factor in protection of the rights of transferee than payment of consideration. Therefore, even if it is proved that consideration is real, it does not always mean that transferee was in good-faith. However, no presumption of fraud can be made merely on the ground that consideration was inadequate.¹⁰

A notice was sent under certificate of posting as soon as the real owner came to know about the clandestine sale. A copy of the notice alongwith the certificate of posting was produced in evidence. The agreement of purchase by the subsequent purchaser was signed five days after despatch of the notice. The Supreme Court held that it could be presumed that the notice was duly served on him before he signed the purchase agreement. He was thus not a *bona fide* purchaser for value without notice. The suit was decreed in favour of the real owner.^{11a}

Rights created under insolvency laws.—Section 53 does not affect the rights created under the law of insolvency. Thus, rights of a transferee created under any provision of insolvency law are not affected even if the transferor's intent was to defeat or delay the interest of creditors. The object of transferor's intent was to distribute the insolvent's properties in equal proportion insolvency laws is to distribute the insolvent's properties in equal proportion among his creditors without giving any preference to any one. If one creditor is given any preference, it may be fraudulent under the law of insolvency. Whereas, such preference has not been regarded as fraud under Section 53. Therefore, there are inconsistencies in the laws of insolvency and Section 53. In *Javadi Narasimhamurti v. Maharaja Pittapur*¹¹ the Madras High

Court observed that "it is necessary to distinguish between certain classes of cases and to remember that Section 53, Transfer of Property Act does not apply to transactions which though supported by good consideration, might in case of an insolvency be impeached as fraudulent preferences." The Court has given others points of difference between insolvency laws and the law given in Section 53.

Where the transferor (debtor) has been declared insolvent and the transferee purchases property from such insolvent person, the transfer cannot be avoided by creditors, under Section 53. In such cases, the Insolvency Courts are competent to decide whether the transfer is voidable under Section 53 of this Act on application made by Official Assignee or the Official Receiver, as the case may be.¹² However, this jurisdiction is not exclusive and in some cases the Court of Insolvency would decline to exercise jurisdiction and leave the matter to be determined under Section 53 in a regular suit.

Section 53 (2) : Gratuitous transfer to defraud subsequent transferee.—Section 53 (2) enacts that gratuitous transfer of an immovable property with intent to defraud a subsequent transferee shall be voidable at the option of subsequent transferee. The second part of Section 53, therefore, contemplates a situation where an immovable property is first transferred to a person without consideration and the same property is again transferred to another person. Under, this sub-section, the subsequent transferee may avoid the first transfer if he could prove that the former gratuitous transfer was fictitious or sham transfer and was made with a view to defraud him (subsequent transferee).¹³ For instance, A makes a gift of his house to B in January, 1990. In February, 1990, A sells the same house to C. Here B and C are two claimants of the same property. The general rule is that first transferee has preference over the second and C should not get the house. But, under this sub-section it is provided that if first transfer is proved to be fraudulent, the subsequent transfer shall prevail and the first would be voidable by the subsequent transferee. In other words, this sub-section protects the interest of a *bona fide* transferee for value from a fraudulent gratuitous transfer made earlier.¹⁴

However, the mere fact that the first transfer was gratuitous and the second transfer is with consideration, does not raise presumption of fraud in respect of the prior transfer. Fraud in the prior transfer must be fully established. For example, where a person settles his properties on A for the benefit of his children and after sometimes sells the same properties to B, no presumption can be drawn that prior transfer was necessarily with a view to defraud B. The issue of fraud must be fully established by B.

The expression 'subsequent transferee' does not include a purchaser at the Court-auction whether he is a third party or the decree-holder himself.¹⁵

8. *Vinayak v. Kantiram*, AIR 1926 Nag. 293; *Natha v. Magancharud*, (1903) 27 Bom. 322; *Akmal Shukoor v. Arif Papa Rao*, AIR 1963 S.C. 1150.

9. (1916) Mad. W.N. 288, 34 I.C. 744.

10. *Dona v. Govind*, AIR, 1924 Nag. 124.

10a. *Samitri Devi v. Sampurnan Singh*, AIR 2011 SC 773.

11. A.I.R. 1941 Mad. 690.

12. *Mulla*, TRANSFER OF PROPERTY ACT, Ed. VII, p. 271.

13. *Keshab Chandra Nayak v. Laxminidhar Nayak*, AIR 1993 Orissa 1.

14. *Firm Man Singh v. B.N. Singh*, AIR 1940 Lah. 198.

15. *Mahendran v. Suresh Prasad*, AIR, 1958 Pat. 568.

53-A. Part-performance.—Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in furtherance of the contract and has done some act in and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that [1914] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

SYNOPSIS

- Doctrine of part-performance.
 - Section 53-A is a partial importation of English Equity of part-performance.
 - Part-Performance in India before 1929.
 - Doctrine of part performance under S. 53-A.
 - Amendment of S. 53-A T.P. Act and other enactments.
 - Legal effects of Amending Act (48 of 2001) in 53-A.
 - Essential Conditions for Application of Section 53-A.
 - Contract for transfer of immovable property.
 - Written contract.
 - Transfer for Consideration.
 - Movable property.
 - Valid contract.
 - Possession in furtherance of contract.
 - Some act in furtherance of contract.
 - Transferee is willing to perform his part of contract.
 - Nature of transferee's rights under Section 53-A.

16. The words "the contract, though required to be registered, has not been registered, or" has now been omitted from this section by the Registration and Other Related Laws (Amendment) Act, 2001 [Act 48 of 2001 dated 24-9-2001].

- No title or interest in property.
- Passive equity; no right of action.
- Prabodh Kumar Das v. Dantamara Tea Co. Ltd.
- Transferee as Plaintiff or Defendant?
- Rights of Subsequent Transferee for Value.
- Difference between English and Indian Law.

PART-PERFORMANCE

Doctrine of Part-performance.—Doctrine of part-performance is an equitable doctrine. It is also known as 'equity of part-performance'. Under this doctrine, if a person has taken possession of an immovable property on the basis of a contract of sale and has either performed or is willing to perform his part of the contract then, he would not be ejected from the property on the ground that the sale was unregistered and legal title had not been transferred to him. For instance, there is a contract of sale of a piece of land between A and B. The contract is in writing, stamped, attested and duly executed but not registered by A who is the seller. B, who is the purchaser, has performed or is willing to perform his part of the contract i.e. has paid the price or is willing to pay the same. On the basis of such contract B takes possession of land. Now, A sells the land to C through a registered deed. C having legal title of the land, attempts to eject B. At this stage, since B has no legal title, law may not protect his possession but, equity shall help him from being dispossessed. The doctrine of part-performance is, therefore, based on the maxim: *Equity looks on that as done which ought to have been done*. That is to say, equity treats the subject-matter of a contract as to its effects in the same manner as if the act contemplated in the contract had been fully executed, from the moment the agreement has been made, though all the legal formalities (e.g. of registration) of contract have not been yet completed.

Under English law, the equity of part-performance was developed by the Chancery Courts against the strict provisions of the Statute of Frauds, 1677. Section 4 of this Act provided that all agreements in respect of transfer of lands must be in writing. Under this provision, the transfer of immovable property on the basis of oral agreement was illegal and transferee could not get title in the land. Although, the Statute of Frauds was enacted to avoid fraud being played in the transfer of lands on oral agreements but, strict application of this law created great hardship to such transferee. In this way, a *bona fide* transferee who performed his part of contract by paying the price in full or in part and who had also taken possession of land could not get title merely because of the absence of legal formalities. Such transferee were helpless and were being harassed. Equity then came to their help. Chancery Courts, which were the Courts of equity, held that part-performance by such transferees would take their cases out of the Statute of Frauds. Thus, equity protected the interests of those transferees who held lands on the basis of oral contracts and had performed their part of contract. Since then, the equity of part-performance developed further and passed through several stages for protecting the interests

of the transferees who had performed their part in contract in good-faith and the transferor attempted to harass them on the ground of technical defect in the contract. The English equity of part-performance is well illustrated in the *Maddison v. Alderson*¹⁷ which is a leading case on this doctrine. In this case, Lord Selbourne explained the doctrine in the following words:

"In a suit founded on such part-performance, the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute itself, if thought to have had in contemplation, would follow."

Section 53-A is a partial importation of English Equity of part-performance.—Section 53-A incorporates the doctrine of part-performance. This section was included in the Transfer of Property Act by the Amending Act of 1929. Before this amendment, there was no enacted law in India on this subject. This Anglo-Indian Courts used to apply English equitable doctrine of part-performance to Indian cases. But, the application of English equity to Indian cases was neither certain nor uniform. In some cases the English Law was applied as such i.e. there was total importation of English law of part-performance to Indian cases. In other cases it was not applied at all. Further, in some cases, the English law of part-performance was applied but with some modifications. A brief account of the application of English equity of part-performance in India before 1929, is given below:

Part-Performance in India Before 1929

Before 1929, the application of English equity of part-performance was neither certain nor uniform. In some cases it was applied whereas in other cases it was not applied. In *Mohammad Musa v. Aghore Kumar Ganguli*¹⁸ the Privy Council held that equity of part-performance could be applied to Indian cases just as it was being applied in England. In this case, there was a compromise deed (*razinama*) which was in writing but not registered. Under this deed there was division of certain lands between the parties who had taken possession over their respective parts of the land on the basis of the compromise deed. The parties continued possession over their lands for many years. After about forty years, the heirs of the parties repudiated the compromise deed (*razinama*) on the ground that it was not registered. The Privy Council applied the doctrine of English equity of part-performance as stated in *Maddison v. Alderson* and held that although the *razinama* was unregistered but, since it was in writing, it was a valid document and could not be repudiated. Their Lordships of the Privy Council observed: "They do not think that there is anything either in the Law of India or of England inconsistent with it (the doctrine of part-performance) but, on the contrary that these laws follow the same rule." The effect of this decision was to by-pass the provisions of the Indian Registration Act, 1908 under which it is provided that a document required to be registered under this

Act but not registered shall not be a valid document of transfer of rights in immovable property.

But, later on, in *Ajif v. Jadunath*,¹⁹ the Privy Council changed its opinion and held that the doctrine of part-performance could not be applied in India to over-ride or by-pass the express provisions of the Indian Registration Act, and Transfer of Property Act. In this case, the plaintiff granted a permanent lease of a land to the defendant. The lease was oral; it was neither executed nor registered. But, on the basis of this oral agreement the defendant took possession of the land and also made buildings on that land. After about ten years, the plaintiff refused to grant the lease and sought to evict the defendant treating him as a tenant on month to month basis. Following *Mohammad Musa's* decision of the Privy Council, the Calcutta High Court applied the doctrine of part-performance and gave its judgment in favour of the defendant. The plaintiff then went in appeal to the Privy Council which reversed the decision of the Calcutta High Court. The Privy Council in this case treated *Mohammad Musa's* decision as merely an *obiter* and observed that this was no authority for India. Their Lordships held that the doctrine of part-performance could not be applied against express provisions of statutory laws such as the Transfer of Property Act or the Indian Registration Act. Under Section 107 of the Transfer of Property Act a permanent lease could be granted only by a written and registered document; an agreement against such enacted law cannot be held valid under this doctrine. Giving reasons the Privy Council observed:

"Whether an English equitable doctrine should in any case be applied so to modify the effect of an Indian Statute may well be doubted; but that as English equitable doctrine affecting the provisions of an English Statute (of Frauds) relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create, without any writing, an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible."

It is significant to note that in this case the Privy Council did not apply the English equity of part-performance mainly on two grounds:

- (1) the agreement for lease was oral, and
- (ii) this was in express violation of the provisions of statutory law namely, Section 107, of the Transfer of Property Act.

After this decision, the next case which came before the Privy Council was *Minu Pir Bux v. Sardar Mohammad Tahir*.²⁰ In this case too the defendant had taken possession over a land on the basis of an oral agreement for sale. On being evicted by the plaintiff he took the defence of part-performance. The Privy

17. (1883) 8 A.C. 467.

18. (1914) 42 Cal. 801; 28 I.C. 930.

19. A.I.R. 1931 P.C. 79; 58 I.A. 91.

20. A.I.R. 1934 P.C. 235.

Council, while rejecting his plea held that English equity of part-performance was not available in India against express statutory provisions regarding registration contained in the Registration Act, and the Transfer of Property Act.

Note.—The judgments in both the cases stated above namely, the *Airiff's* case and *Mian Pir Bux*, were delivered after the enactment of Section 53-A but as they went to the Privy Council before 1929, the law dealt in these cases was the Indian law as it was before 1929.

From the above-mentioned discussions it is clear that the Anglo-Indian Courts and the Privy Council were in favour of this equity in India but with some modifications. Application of English equity in India was therefore, neither uniform nor certain. It was, necessary to enact law on this subject. Accordingly, Section 53-A was included in the Transfer of Property Act by the Amending Act of 1929.

Doctrine of part-performance under Section 53-A of T.P. Act

The doctrine of part-performance is now an enacted law ; it is not an application of English equity in India. The law contained in Section 53-A of the Act is almost same as it was laid down by the Privy Council in *Mohammad Misa's* case which had applied the English equity of part-performance with certain restrictions. The law incorporated in Section 53-A is more limited than English equity in two respects. *Firstly*, in England the equity protects the interest of also such defendant who has taken possession on the basis of oral agreement, whereas, under Section 53-A, the agreement must be written. *Secondly*, in England the equity gives also a right of action against the evictor but Section 53-A gives no such right. Thus, the rule of part-performance which is administered in England as equity is now a statutory law in India but with suitable changes. Accordingly, it has rightly been said that Section 53-A is a *partial importation into India of the English equitable doctrine of part-performance*.

Amendment of Section 53-A T.P. Act and other enactments

An amendment has been made in Section 53-A of the Transfer of Property Act by the Registration and other Related Laws Act (48 of 2001)²¹ This Amending Act (48 of 2001) has made following amendments relating to Section 53-A :—

1. In Section 53-A, para 4 of the Transfer of Property Act the words "the contract, though required to be registered, has not been registered, or," Omitted.
2. In Section 17 of the Registration Act, (a) after sub-section (1), the following sub-section shall be inserted :

"(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after

the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53-A."

3. In Section 49 of the Registration Act, in the proviso ; the words, figures and letter "or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882)," shall be omitted.
4. The provisions of this Amending Act (Act 48 of 2001) came into force with effect from 24-9-2001. This Amendment Act is not retrospective.

Legal effects of the Amending Act (48 of 2001) in Section 53-A.—In *para fourth* of Section 53-A of the Transfer of Property Act, the words "the contract though required to be registered, has not been registered" has now been omitted. This may mean to suggest that non-registration of any contract to transfer for consideration is not any relevant factor (*i.e.* not necessary) for the application of part-performance under this section, and, the defence of part-performance is available also on the basis of an un-registered document. But, this is not the case. The same amending Act (48 of 2001) has simultaneously amended Section 17 and Section 49 of the Registration Act. Therefore, the amendment in Section 53-A should be read together with amendments in Section 17 and Section 49 of the Registration Act. In Section 17 of the Registration Act, a new clause has been inserted (17-A), which provides that written documents of the transfer of an immovable property with consideration (*e.g.* for sale) must be registered for the purposes of Section 53-A of the T.P. Act; and, if such documents are not registered then, they shall have no effect for the purposes of Section 53-A of the T.P. Act. Thus, an obvious meaning of these amended provisions of Section 53-A of the T.P. Act and that of Section 17-A of the Registration Act is that Section 53-A shall not be applicable and the defence of part-performance cannot be available on the basis of un-registered documents which are executed on or after 24-9-2001, the date of enforcement of the amending Act 48 of 2001. Therefore, the contract of the transfer of immovable property with consideration as provided in Section 53-A is now *compulsorily registrable* document.

Further, it is to be noted that by inserting Section 17-A, the Registration Act has made an exception to the settled substantive law with regard to the written contracts affecting immovable property. The reason is aptly given by Mitra in the following words :

"It is settled law that a writing which confers upon a person a right which will come into existence after fulfilment of certain conditions; does not require registration under Section 17-A. For example, an agreement for sale of an immovable property will not fall under Section 17(1)(b) as (because) it does not create, assign, limit or extinguish any right, title or interest whether vested or contingent, of immovable property. An exception to this settled law has been made by inserting sub-section (1A) in the statute (Reg. Act)——What sub-section (1A) really postulates (contemplates) is that if the contract is

sought to be used for the purpose of using it to defeat the claim of the plaintiff under Section 53-A of the T.P. Act, the same must be registered and unless it is registered, then, in view of the amended proviso of Section 49 (of Registration Act) the unregistered document cannot be an evidence to support the defence of part-performance under Section 53-A of the T.P. Act.²²

In view of the above-mentioned amendments, it is obvious that the 'proviso' of Section 49 of the Registration Act be now omitted.

The 'proviso' of Section 49 (which deals with effect of non-registration of documents, required to be registered) the word, "as evidence of part-performance of a contract for the purposes of Section 53-A of the T.P. Act" has been omitted by the Amending Act (48 of 2001). Accordingly, the present 'proviso' of Section 49 is : "Provided ... an unregistered document affecting immovable property and required to be registered under Registration Act or the T.P. Act, may receive as evidence of the part-performance or of any collateral transaction not required to be affected by registered instrument."

As a matter of fact although Section 53-A of the T.P. Act, incorporates a substantive right, yet it is only a defensive right i.e. the right to continue the possession of a person which he has already possessed. The 'actual' possession of the immovable property may be proved or disproved on the basis of certain evidences. Therefore, this 'proviso' of Section 49 of the Registration Act may be interpreted to mean that an unregistered document (e.g. written agreement for sale) has an evidentiary value in the eyes of courts for purposes of proving any 'collateral transaction'. Such collateral or related transaction means 'nature of the possession' (i.e. whether the possession is actual or constructive?). Thus although an unregistered document has no value in the court for purposes of 53-A (a substantive right to defend possession) but the courts may accept the evidence of factual position of the possession of the property in question.

In nutshell, the amendments of Section 17 and Section 49 of the Registration Act has now incorporates the law which fulfils the real purpose of amending Section 53-A of the Transfer of Property Act. The object or the real purpose of these amendments (amending Act 48 of 2001) is that there should not be any perpetual possession of an immovable property evading the law of registration. Accordingly, Section 53-A of the T.P. Act now "insists upon proof of some acts having been done in furtherance of contract. There must be a real nexus between the 'contract' and the 'acts' done in pursuance or furtherance thereof"²³

Note :—The law stated in the following pages is subject to suitable alterations when and where required in view of the Registration and Other Laws (Amendment) Act, 2001 (48 of 2001).

Section 53-A.—Section 53-A of the Act provides that—

- (i) where a person contracts to transfer an immovable property for consideration, and

22. MITRA, B. B., TRANSFER OF PROPERTY ACT, Ed VIII (2004), p. 373.

23. MITRA, B. B., TRANSFER OF PROPERTY ACT, Ed VIII, p. 375.

- (ii) acting in furtherance of this contract, the transferee has taken possession over a part or whole of property, and
- (iii) such transferee has either performed his part of contract or is willing to perform it;

then although the contract is unregistered or the transfer is not made as prescribed by law, the transferor or any other person cannot dispossess the transferee.

Under this section the transferee can only defend his possession. He can neither claim title of the property nor take any action that property in his possession should not be transferred to any other person.

The proviso to this section protects the interest of a subsequent transferee for consideration without notice of 'contract' or rights of part-performance of any person.

Essential Conditions for Application of Section 53-A.—Analysis of the provisions of Section 53-A makes it clear that following essential conditions are necessary for its application :

- (1) There is a written contract for the transfer of an immovable property.
- (2) The transferee takes possession of the property under this contract.
- (3) The transferee has either performed his part of contract or is willing to perform the same.

When the above-mentioned conditions are fulfilled, the transferee can defend his continuance of possession over property. In other words, if these requirements are fulfilled, the transferee is entitled to claim, under this section, that he should not be dispossessed or evicted from the property.

Contract for transfer of immovable property.—For the application of this section, the first condition is that there must be a contract and the contract must be transfer of immovable property for value. An agreement to sell a property which was in the nature of part performance contained the transfer of a right in the property. The Court said that the validity of such a document could not be doubted merely on the ground of confusion on the aspect of consideration specially when the agreement was admittedly signed by the vendor and his witness.²⁴

Written contract.—The contract must be written. Section 53-A is not applicable if the contract for transfer is oral.²⁵ Where a tenant wanted to defend his possession on the ground that there was an oral agreement of sale with his landlord, the Court held that plea of part performance is not available to him because written contract is must for applicability of Section 53-A.²⁶ In *Leprosy Mission v. N. V. V. Satyanarayana Reddy*,²⁶ there was neither any written contract of the transfer of immovable property nor was any

23a. *Aslak Indora v. Vidgmati*, AIR 2015 Del 5.

24. *V. R. Sudhakar Rao v. T. V. Ramaswami*, (2007) 6 SCC 650, the benefit of Section 53-A is not available to a person who is in possession of the property based on an oral agreement of sale. *Karim Chand v. IRI of Labelland*, AIR 2009 NOC 868 (Raj), tenant claiming possession as owner on the basis of an oral agreement of sale, not allowed. *Gorind Pressed Dairy v. Chandra Mohan Agasthi*, AIR 2009 MP 159, an oral buyer not entitled to be implemented.

25. *Kaniganti Tripathi v. Damayanti Devi*, AIR 1993 Pat. 1.

26. AIR 1998 AP 238.

evidence on which date the property was delivered to transferee. The Andhra Pradesh High Court held that the transferee's possession was not valid under the law and Section 53-A is not applicable. Similarly, in *S. Vetrabhadra Naiker v. Sambanda Naiker*,²⁷ the party claiming protection under Section 53-A, could neither produce any written agreement nor any evidence of his possession over the suit property. The documents could not prove that he was ever ready and willing to perform his part contract. The Madras High Court held that he was not entitled to protection under Section 53-A against third party purchaser of the suit property.

Writing alone is not sufficient. The contract must also be duly executed. That is to say, it should be signed by the transferor or by any other person on his behalf. The person who signs on his behalf must be a person who is authorised by him to sign the document. Therefore, it is necessary that the contract is either actually signed by the transferor or is signed by a person who has specifically been authorised to sign on behalf of the transferor and whose signature can bind the transferor. Where a guardian executed an agreement for the sale of his ward's property and gave possession of property to purchaser, the purchaser was entitled to claim the benefit of Section 53-A, against the minor. It was held by the Privy Council that guardian's signature in the contract of sale was binding on the minor for purpose of Section 53-A.²⁸

Further, the written contract on the basis of which the property has been possessed, must clearly suggest the transfer of property. If the document is ambiguous or confusing, this section cannot be made applicable. It is one of the necessary ingredients of Section 53-A that the terms of the written contract must be ascertainable with reasonable certainty. In *Mool Chand Bakhta v. Rohan*²⁹ the Supreme Court held that an express written agreement for the transfer is a *sine qua non* (i.e. must) for the applicability of the equitable doctrine of part-performance as laid down in Section 53-A of the Act. Briefly, the facts of this case were as under. The owner of the property (vendor) alleged to have written letters to the proposed vendee, (having possession of the property) admitting that he had agreed to sell his half share of the property for a sum of Rs. 15,000 out of which Rs. 10,000 was received by him. In each of these letters the vendor (seller) asked the vendee to pay the balance amount Rs. 5000 as he was in need of money. But the vendee failed to do so. Ultimately, the vendor wrote a letter to vendee in which he repudiated the so-called agreement to sell saying that vendee has failed to perform his part of the agreement. However, on the basis of these letters the vendee claimed protection of his possession over the property. The Supreme Court held that the letters written by vendor cannot be treated as an agreement to sell the terms of which have been reduced to writing. The Supreme Court observed further that 'at the most it is an admission, of an oral agreement to sell and not a written agreement'. Accordingly, the proposed vendee could not protect his possession of the immovable property under Section 53-A.

Besides being an express agreement for sale, the agreement must also be perfect and genuine in all respects. For example, the signature of the executant must also be fully established to be authentic. Where the executant in the agreement of sale denied her thumb impression and the handwriting expert also gave his opinion in her favour, it was held that part performance was not applicable.³⁰

Agreement to sell.—An agreement to sell does not by itself create any right, interest or title to property. Such rights are created only by a sale deed. Accordingly the Court held that an agreement to sell is not required to be registered. It is admissible in evidence in a suit for specific performance.^{30a}

Transfer for Consideration.—The written contract must be for the transfer of an immovable property for consideration. It is necessary that the transfer of property has been referred to in the contract. The terms necessary to constitute the transfer are ascertainable with reasonable certainty; it must clearly show that there is a transfer of property under the contract.³¹

The plea of part-performance cannot be taken where the contract does not amount to a document for the transfer of property. 'Transfer' here means a transfer of property within the meaning of this Act. Thus, Section 53-A does not apply to a partition or family-settlement. Similarly, this section was not applied to *Kabuliat* executed only by lessee because there was no transfer of interest by lessor (transferor) to lessee (transferee).³²

The transfer must be for consideration. Section 53-A is applicable where the contract is for sale or for lease. The section is applicable also to usufructuary mortgages or mortgages with possession.³³ But, this section does not apply where the transfer is without consideration. Therefore, it is inapplicable to gifts.

An agreement without consideration being void under Section 23 of the Contract Act, 1872, it cannot become a source of protection of possession under the section.³⁴

Movable property.—This section does not apply to an agreement for the transfer of movable properties even though supported with consideration. No

30. *Hanida v. Humer*, AIR 1992 All. 346; *Official Trustee of West Bengal v. Stephen Court Ltd.*, (2006) 13 SCC 401. Imperfect lease for 99 years, the official trustee v. on collecting rent on monthly basis and also allowed a huge structure to be raised. The lessee became entitled to protection of his possession under Section 53-A as well as under Section 107. *Parini Vishnumurthy v. Vundaralli Dorayya*, AIR 2009 AP 187, the agreement was genuine, the vendee was ready and willing to pay balance of the purchase money, the sale deed could not be executed because of the migration of the vendor to another State, the vendee was allowed to invoke Section 53-A.

N. Biswanath v. B. Sridhar, AIR 2009 NDC 2691 (Kar), the vendee entitled to defend his possession without filing a suit for specific performance, suit for specific performance time-barred, immaterial.

30a. *Subhinder Kaur v. Amarjit Singh*, AIR 2012 P & H 97.

31. *Hanida v. Humer*, AIR 1992 All. 316.

32. *Ram Narain v. Subhi*, AIR 1957 Pat. 24; *Chandra Nath v. Chulai Pasai*, AIR 1960 Cal 40.

33. *Ram Reddi v. Venkata Reddi*, AIR 1963 Andh. 489.

34. *Thakurmal v. Chakrindhar Rao Bhosle*, AIR 2009 Chh 27. In this case, as against the notice to quit, the tenant contended that he had agreed to buy the property from the landlord, but that agreement did not mention any consideration.

27. AIR 2003 Mad. 19; *Manglu Mool Singh v. Kurilal*, AIR 2014 Chh. 31, contract of sale not in writing, section not applicable.

28. *Subhmanjuri v. Subha Rao*, AIR 1948 PC 95.

29. AIR 2002 SC 812.

defence of part-performance is available in respect of possession of moveables. Stipulation authorising the owner to seize a vehicle given out on hire purchase for non-payment of an instalment is valid and this section does not apply.³⁵

Valid contract.—It may be noted that Section 53-A is applicable only where the contract for the transfer is valid in all respects. It must be an agreement enforceable at law under the Indian Contract Act, 1872.

The contract on the basis of which the transferee takes possession over the land must also be a complete and valid document of transfer. It must be in writing, signed, attested and duly stamped. Earlier, except the registration (which completes the transfer) all other formalities must have been lawfully completed. It may be said that now it cannot be said that in contract there only requirement of registration. At present, the contract must be complete in all respects including registration.

In view of the Amending Act (48 of 2001) which amended the Registration Act (Section 17-A) and Section 49 (proviso) so as to amend Section 53-A the scope of Section 53-A is now very limited. It simply gives recognition to incomplete deed of transfer which as written contract is an evidence that transferee's possession is not unauthorised. The contract of transfer is now admissible as evidence of the collateral transactions. That is to say, an unregistered contract has no value for purposes of plea of Sec. 53-A, yet it has evidentiary value for certain fact related to the transaction. Though the formalities required to effect the transfer has not been completed and the transferee cannot take plea of a valid contract for transfer. For example, where the law provided that a contract with a corporation must be executed in a manner prescribed under that law but the statutory provisions of that law were not followed the contract was invalid. As such, the Court held that the contract was not binding on the parties although there was part-performance.³⁶ This doctrine will have no application also in cases where for want of sufficient stamps or loss of the original document. It cannot be proved as a valid evidence for the transfer of property.

Possession in furtherance of contract.—The second essential requirement is that the transferee has taken possession or continues possession in part-performance of the contract or, has done some act in furtherance of the contract.

It is necessary that the transferee has taken possession of the immovable property on the basis of the contract or incomplete deed of transfer. Where the plaintiff had entrusted his property to the defendant for management by executing power of Attorney and it could not be proved that defendant obtained possession and in furtherance of contract of sale, it was held that the defendant

could not claim benefit of Section 53-A.³⁷ It is to be noted that this section requires that the transferee has taken possession of the property. It is irrelevant as to whether the vendor himself has given the possession or not. Therefore, it is not necessary that the vendor himself should have delivered the possession of the property.³⁸

The possession must be taken only on the basis of the contract or deed of transfer. This means that possession must be taken in furtherance of such contract, or, it must be taken in part-performance of the contract. The contract or incomplete deed of sale is a contract which would transfer the property. The transferor has performed his part of contract by executing it and has otherwise completed it except registration. The transferee's part is to take possession of that property for the transfer of which the contract was executed. So, the transferee must take possession of property in part-performance of this contract. If the transferee has not taken possession of the property, this section cannot apply.³⁹

The condition is that the transferee has taken possession in furtherance of or in part-performance of contract. Where the transferee has once taken possession of the property, the fact that subsequently he lost that possession cannot deprive him of his rights under Section 53-A.⁴⁰

The transferee need not be in possession of the whole property mentioned in the contract of sale. If the transferee take possession or continues his possession even on a part of that property, it is sufficient to give him the benefit of this section.⁴¹

Where the transferee is already in possession of the property in some other capacity and the essential requirements of this section are fulfilled then, this section shall entitle him to continue that possession. However, mere continuance of possession on some other ground shall not be sufficient; the possession must be continued on the basis of *i.e.* in furtherance of contract of sale. In *Sunil v. Aggar*,⁴² the Gauhati High Court, held that for a tenant continuing in possession of an immovable property after a valid contract of transfer, it is necessary for him to show that he continues in possession in pursuance of that contract of transfer. Without this, he cannot get the benefit of this section.

Where a person enters into possession of a premises as tenant and there is no cogent and convincing evidence to show as to when possession became adverse and hostile, then mere possession for a long time would not convert a permissive

37. *A.M.A. Sulten v. Saidu Zahra Beem*, A.I.R. 1990 Ker. 187; *Nanjagonda v. Gangamma*, AIR 2011 SC 3774; (2011) 13 SCC 232, in a suit for declaration of title and possession, the defendant claimed that he was put in possession in part performance of the agreement to sell. An irrevocable power of attorney was given to him. But recitals in the power showed that the owner was still in possession. Finding of the Court that the defendant was not in possession was held by the Supreme Court to be justified.

38. *Nagar Khat v. Gopi Ram*, A.I.R. 1976 Pat. 83.

39. *Sanyasi Raju v. Kannappa*, A.I.R. 1960 Andh. 83.

40. *Acharya v. Venkata Subba Rao*, A.I.R. 1957 Andh. 854.

41. *Durga Prasad v. Kamlinga Lal*, A.I.R. 1979 Raj. 200.

42. A.I.R. 1989 Guahat. 35.

35. *Hamid v. Jagabharat Credit & Invest. Co.*, AIR 1986 Ker. 206.

36. *Sham v. Corporation of Calcutta*, A.I.R. 1956 Cal. 18.

possession into adverse possession. In *Roop Singh v. Ram Singh*,⁴³ the Supreme Court held that once it is admitted by implication that plaintiff came into possession of land lawfully and continued to remain in possession till the date of suit, the plea of adverse possession would not be available to the defendant. The plea of adverse possession and retaining possession by operation of Section 53-A are inconsistent with each other.

Claim for possession.—Possession was claimed on the ground of part performance of an agreement of sale. The plaintiffs, their mother and brother, were class I legal heirs. The brothers inherited the suit property after demise of their father. They had not executed any agreement of sale of their respective shares. The alleged agreement was executed by the plaintiff's brother. It was not registered and no witness was present to prove the execution. The defendants' therefore had no right to seek possession of the suit land. They were not entitled to benefit of Section 53-A.⁴⁴

Some act in furtherance of contract.—Taking possession is not the only method of part-performance of contract. If the transferee is already in possession of the property then, after the contract of transfer, he has to do some 'further act' in part-performance of that contract. In order to attract the provisions of Section 53-A, if the defendant has been in possession of property, he must have done something more in pursuance of the contract. For example, where transferee was already in possession of the property, payment of an increased rent under the terms of new agreement or, part-payment of the price where property is agreed to be sold to a mortgagee in possession, is a 'further act' in part-performance of the agreement.

It is also necessary that the act done is only in furtherance of a pre-existing valid contract. There must be direct co-relationship between the contract and 'act' done, in its furtherance. Anything done anterior (before) to the contract or merely incidental to the terms of contract shall not be regarded as an act in furtherance of the contract of sale. Such act is, therefore, not evidence of part-performance.⁴⁵ In *D.S. Marathamma v. A. Srinivasan*,⁴⁶ a tenant claimed himself to be in possession of the house in part performance of mutual agreement between the parties. The suit for specific performance was, however, dismissed. The tenant could not prove, on record, that he was ready and willing to perform his part of agreement. Moreover, he was also not shown to have delivery of his possession of property in part performance. The Supreme Court held that on the basis of these facts, the doctrine of part-performance could not be applicable and his (tenant's) possession could not be protected under Section 53-A.

Transferee is willing to perform his part of contract.—Section 53-A is based on the principles of equity. Equity says that 'one who seeks equity must do

equity'. Therefore, where a person claims protection of his possession over a land under Section 53-A, his own conduct must be equitable and just. It is an essential condition for the applicability of this section that the transferee must be willing to perform his part of contract. Equity of part-performance which is incorporated in this section cannot favour a transferee who is not ready and willing to do what is required from him. Accordingly, a vendee who has taken possession of the property, cannot protect his possession under this section if he is not willing to pay the price agreed upon.⁴⁷ Similarly, a person who actually did not pay the full consideration but falsely pleads that he had paid the full price, cannot be said to be 'willing' to perform his part of contract.

Where possession of a tea estate was handed over to the purchaser and he was to discharge certain definite obligation under the agreement, it was held that his failure to perform the obligation amounted to a breach of the agreement, protection of Section 53-A was not available. His right to seek arbitration under a clause of the agreement was not defeated.⁴⁸

Willingness to perform the part ascribed to a party must not be conditional. In *Jacob Priente Ltd. v. Thomas Jacob*,⁴⁹ the Kerala High Court held that such willingness in the context of Section 53-A of the T.P. Act must be absolute and unconditional. If the willingness is studied with a condition, it is in fact no more than an offer and cannot be termed as willingness. The Court observed that where the vendee company expresses its willingness to pay the amount provided the plaintiff clears his income-tax arrears, there is no complete willingness and such a conditional willingness is not sufficient to arm the company with the shield provided by Section 53-A of the T.P. Act.

It is not necessary that transferee should plead his 'willingness' in each and every case. Such willingness may be inferred from his conduct. In judging willingness to performance, the Court must consider the obligations of the parties (transferor and transferee) and the sequence in which they were to be performed.⁵⁰ Where a purchaser of land was to pay some part of the price only after inspecting the revenue records and he could not do so because records were being corrected, it was held that he could not be said to be 'not willing' to pay the balance price.⁵¹ In *Teja Singh v. Ram Prakash Talwar*,⁵² the transferee was already in possession of an immovable property under an agreement of sale. The transferor accepted that the payment of instalments by transferee was delayed as agreed, but the transferee was willing to perform his part of contract by making payment of the remaining instalments. The Punjab & Haryana High Court held that benefit under Section 53-A cannot be denied to the transferee.

47. *Bechardas v. Alamedabad Municipality*, A.I.R. 1941 Bom. 346; *Gowind Rao v. Devi Sahai*, A.I.R. 1982 S.C. 989.

48. *Tongani Tea Co. Ltd. v. Russell Inhill Ltd.*, A.I.R. 2014 Gau. 41.

49. A.I.R. 1995 Ker. 249.

50. *Mulla*, TRANSFER OF PROPERTY ACT, ED. VI, p. 281.

51. *Nathulal v. Poochland*, A.I.R. 1970 S.C. 546.

52. A.I.R. 1984 P & H. 95.

43. AIR 2000 SC 1485; *Udai Saphola v. Latni Prasad Saphola*, AIR 2013 Sik. 21, consideration paid, transferee put in possession, immaterial that the instrument of transfer not registered, or the instrument not made in the prescribed manner, transferor not allowed to take advantage of his default in not giving registered document.

44. *Veneeta Kimsanjiliev v. Tushar Neth Bhattacharjee*, AIR 2014 NOC 590 Meg.

45. *Gowind v. Devi Sahai*, AIR 1982 SC 989.

46. AIR 2003 SC 3542.

Readiness to pay the consideration is not the only conduct which shows willingness of the transferee to perform the contract. The Karnataka High Court⁵³ held that if the defendant who took the plea of part-performance had demanded specific performance within the stipulated time, he was deemed to be ready and willing to perform his part of the contract. On the other hand, failure to do so would mean that he could not show his willingness to perform his part of the contract.

Willingness of the transferee to perform the contract must subsist till the final decision of the Court.⁵⁴

Nature of transferee's rights under Section 53-A

(a) *No title or interest in property*.—Section 53-A does not confer any title or interest to the transferee in respect of the property in his possession. This section provides that when the conditions laid down in it are fulfilled, the transferor or any other person cannot evict the transferee. In the event of being evicted he can raise the defence of equity of part-performance and Section 53-A would protect his right to continue the possession. Except the right to continue his possession, no other interest or title is created in favour of the transferee. This section therefore imposes a statutory bar on the transferor (*i.e.* he cannot dispossess transferee) but does not confer any title on the transferee.⁵⁵

The transferee can get title of the property under the contract of sale only after its registration. Section 53-A entitles the transferee merely to protect his possession; for getting title under the contract of sale, its registration is necessary. So, this section does not defeat the provisions of the Registration Act or Transfer of Property Act. In *Technicians Studio Ltd. v. Lila Choudhary*⁵⁶ the Technicians Studio was formerly a sub-lessee of the disputed premises but later on became a direct tenant for 16 years under a 'compromise' which was unregistered. Any lease-deed was not executed. After expiry of the period of direct lease (16 years) under the compromise the landlord issued notice and filed a suit for eviction. The Supreme Court observed that since there was no lease-deed and the compromise was also unregistered, it created no interest in favour of the Technicians Studio. The subsequent possession after the 'compromise' did not confer any active title on the transferee (Tech. Studio) but only imposed statutory bar on the transferor (landlord). The Court held that under the unregistered compromise deed, the Tech. Studio could, protect its

eviction for 16 years by reason of part-performance. But after this period, the Tech. Studio was not entitled to claim any title or interest in the property.

Section 53-A does not affect the ownership rights of the proposed transferor who remains full owner of the lands till they are legally conveyed by sale-deed to the transferee; he continues to be the owner of lands for all purposes including computing of, areas of land under the Land Ceiling Legislation.⁵⁷

(b) *Passive equity; no right of action*.—Section 53-A does not give to the transferee any right of action. It provides merely a right of defence. That is to say where a transferee takes possession of an immovable property, he can raise the defence of part-performance in case he is evicted by transferor or any other person. He is not entitled to restrain the transferor from transferring the property to any other person. In *India the equity of part-performance is a passive equity; it can be used only as shield not as a sword*. Under English law, the equity of part-performance is also an active equity and gives to the transferee a right of action against his evictor. The scope of Section 53-A is, therefore, limited because no right of action is available to transferee.

The Supreme Court observed in a case before it that the benefit of the section is not available to a transferee who remains passive. The suit was for declaration of title and possession by the purchaser of property. The defendants claimed that they had been put in possession in part performance of the earlier agreement of sale. They did not intimate their intention to perform their part of the contract. There was no evidence to show that the plaintiff had notice of the earlier agreement. It was held that the defendants were not entitled to the protection of Section 53-A.⁵⁸

Prabodh Kumar Das v. Dantamara Tea Co. Ltd.⁵⁹

It is a leading case dealing with the nature of rights of transferee under Section 53-A. The facts and the law laid down are given below:

Facts.—Gillanders & Co. agreed to sell a Tea Estate to one S.N. Roy. The agreement was not registered. But, S.N. Roy paid the first instalment of the consideration and took possession of the Tea Estate. Later on the Gillanders & Co. sold the Tea Estate to Dantamara Tea Co. through a registered sale-deed on the ground that S.N. Roy failed to give the remaining instalments of consideration. Dantamara Tea Co. as owners of the Tea Estate (but without possession), obtained also the export-licence. Subsequently Prabodh Kumar Das acquired rights under the contract of sale from S.N. Roy and acquired also the same position as that of S.N. Roy. Thus, Prabodh Kumar Das had now the declaration that the Dantamara Tea Co. was not owner of the said estate and that this company had no right to sell tea under the export-licence given to it. Prabodh Kumar Das (Plaintiff/Defendant) prayed also for an injunction.

53. *M. Muthuraman v. A.K. Sengunathar*, AIR 1984 Kant 50.
54. *Mullikertan v. H.V. Ramu Rao*, A.I.R. 1959 Mys. 173; *Girija Shankar v. Shela Devi*, AIR 2013 Chh 30; the tenant-in-possession claimed ownership under part performance, neither he showed his willingness to perform the requirements, nor showed that possession was delivered to him in part performance. *Shankar v. Hasmukhi*, AIR 2013 Cal 193, plea that there was intention to retain possession, not taken in earlier proceedings, not in appeal also which showed that there was no willingness to perform the contract. *Bhimati v. Alam*, AIR 2014 MP 14, defendant took no step for execution of the sale deed or payment of balance price, and also did not file suit for specific performance, held not willing to take benefit of Section 53-A.

55. *Sitaram Rao v. Bibhinani Pradhani*, A.I.R. 1978 Ori. 222; *Delhi Motor Co. v. U.A. Bisenkar*, A.I.R. 1969 S.C. 794.

56. A.I.R. 1979 S.C. 2425.

57. *State of U.P. v. District Judge*, A.I.R. 1997 S.C. 53.
58. *A. Lewis v. M.T. Ramamurthy*, AIR 2008 SC 493.

59. AIR 1940 P.C. 1.

Decision : The Privy Council held that in India the equity of part-performance as incorporated in Section 53-A of the Transfer of Property Act, was not an active equity. It does not give any right of action to the transferee who is in possession of property under an unregistered contract of sale. The right conferred under Section 53-A is a right available only to a defendant to protect his possession.

The injunction was, therefore, not granted and the appeal was dismissed. Accordingly, the established principle of law is that in India the equity of part-performance can be used only as shield not as sword.

(c) Transferee as Plaintiff or Defendant?—It is settled that this section confers on the transferee only the right to defend his possession when he is being evicted by a person having better title. But how he may defend his possession, is not clear. Is it necessary that he must always be 'defendant' or can also be plaintiff if needed for defending his possession? Opinion of the High Courts are divided on this point. According to the Allahabad, Bombay and Andhra Pradesh High Courts under this section the transferee may also be plaintiff if it is needed to protect his possession.⁶⁰ But, according to the Rajasthan, Orissa, Madras and Punjab High Courts the transferee has to protect his possession only as 'defendant'.⁶¹

However, the correct view on this point would seem to be that this section gives to the transferee only the right to defend his possession. So, the main point in this regard is his defence; it is irrelevant in what capacity he does so. The transferee, even if he appears in a Court as plaintiff can get protection of Section 53-A provided, of course, he uses it as shield and not as sword. Equally, a defendant will not be entitled to avail of the provisions of Section 53-A if he uses them as a weapon of attack.⁶²

Rights of Subsequent Transferee for Value.—The proviso to this section protects the interests of a subsequent transferee for value without notice of previous transferee's rights of part-performance. Therefore, this section does not affect the rights of a transferee for consideration who has no notice of the contract of sale or of part-performance. For example, A who is owner of a land contracts to sell it to B. The contract is unregistered and in part-performance of this contract B takes possession of the said land. Under this section, the transferee or any other person cannot dispossess B from the land. But, if A sells the land to C through a duly executed and registered sale-deed and C has not the least knowledge of B's rights of part-performance then, Section 53-A shall not apply. And, B (previous transferee) cannot resist C (subsequent transferee) from evicting B and taking possession of the land.

40. *Ram Chandra v. Mahant Kumar*, A.I.R. 1939 All. 611; *Adhyaya v. Venkata Subbarao*, A.I.R. 1957 A.P. 854; *Durmaji v. Jagannath Shankar Jadhav*, A.I.R. (1994) Bom. 254.

61. *Mahesh v. Jaganath Singh*, A.I.R. 1964 Raj. 11; *Padmalatha v. Appala Narsamma*, A.I.R. 1952 Or. 143; *Aruno Singh v. Saradani Dharma Saha*, A.I.R. 1983 P & H 195; See also A.I.R. 1981 Mad. 310.

62. *A.K. Srinivasan v. Nature of Right Under Section 53-A*, 15 I.L.L. (1973), p. 616.

Thus, any rights which the transferee under this section may have against the transferor would not be of any avail against a *bona fide* transferee for value having no notice of the transaction. The burden of proving that the subsequent transferee had notice lies on the person claiming the benefit of part-performance.⁶³

It may be noted that if the prior transferee has neither shown his willingness to perform the contract nor was anxious to do so by taking possession, the subsequent transferee can actually have no notice of prior transferee's rights of part-performance. If no notice on the part of subsequent transferee could be proved, the doctrine of part-performance shall not protect the possession of the prior transferee.

Difference between English and Indian Law.—Section 53-A incorporates the provisions of English equitable doctrine of part-performance. But this section is not total importation of English law. It is modified form of English law; the importation is therefore partial. Indian law of part-performance may be distinguished from the English law as under:

(a) Under English law, the doctrine of part-performance is applicable to written as well as oral agreements whereas, Section 53-A is applicable only where the agreement of transfer is written.

(b) In England, the equity of part-performance is active as well as passive. That is to say, under English law, the transferee is entitled to defend his possession and is also entitled to enforce his right in an independent suit e.g. a suit for specific performance or, for an injunction to restrain disposition. In India, Section 53-A does not give any right of action to the transferee. Part-performance is only passive here.

Note.—The doctrine of part-performance is not applicable to the State of Jammu & Kashmir. In *Suvarni Kumar Jain v. Dev Dutt Mahajan*⁶⁴ the High Court of Jammu & Kashmir held that J & K Transfer of Property Act (42 of 1977) does not provide any rule of law similar to Section 53-A of the Transfer of Property Act, 1882. The court observed that "if the doctrine of equitable estoppel or part-performance is deemed to have received legal recognition in the State of J&K as well, then most of the people who are non-State subjects, can initially purchase property in this State by agreement to sell and afterwards take refuge under the doctrine of equitable estoppel or part-performance as envisaged under Section 53-A of the Transfer of Property Act".

63. *Saibabuntin v. Sunamma*, A.I.R. 1952 Orissa 163; *Paramand v. Kailash Chaud*, A.I.R. 2012 Chh.

64. the subsequent transferee with no knowledge of original transaction. The original transferee was also not performing or even willing to do so.

III OF SALES OF IMMOVABLE PROPERTY

54. "Sales" defined.—"Sale" is transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.—Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract of sale.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself create any interest in, or charge on, such property.

SYNOPSIS

- Definition of Sale.
- Transfer of Ownership.
- Money Consideration.
- Essentials of a Valid Sale.
 - The Parties : Seller and Purchaser.
 - The Subject Matter : Immovable Property.
 - Money Consideration : The Price.
 - Conveyance : Mode of Transfer.
 - (a) Delivery of Possession.
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- Sale deed of Movable and Immovable Both.
- When the Ownership is Deemed to be Transferred?
- Contract for Sale.
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SALE OF IMMOVABLE PROPERTY

Definition of Sale.—Sale is transfer of ownership for money consideration. Section 54 defines sale as a transfer of ownership in exchange for a price paid or promised to be paid. Accordingly, the elements which are necessary to constitute a sale are as under:

- (a) Transfer of ownership, and
- (b) Money consideration.

Transfer of Ownership.—Sale is a transfer of ownership. Ownership is absolute interest in the property. Therefore, in a sale there is transfer of all the rights in the property sold; no rights in respect of property are left with the transferor (seller). Ownership means bundle of all the rights and liabilities of property. So, when ownership is transferred, there is transfer of all the rights in property by transferor to transferee. In other words nothing less than ownership or absolute interest may be transferred by way of sale. Lease is also a transfer of property but, there is transfer of only partial interest (right of use or enjoyment of property).¹ Similarly, mortgage too is transfer of property but, it is transfer of merely a limited interest in the mortgaged property.

The provisions of this section do not bar a *benami* transaction. There is no embargo on getting the property registered in the name of one person although the real beneficiary of the transaction would be another person.²

Money Consideration.—The ownership in the property must be transferred in exchange of money. That is to say, the transferor must receive some money from the transferee in return of the transfer of ownership of his property. The money in exchange of ownership is called 'price'. However, for a valid sale the amount of money is an irrelevant factor. It may or may not be adequate sum of money as compared to the market value of property. For example, transfer of ownership in a property valuing one lac rupees in consideration of only one hundred rupees is a sale, although the price is negligible or grossly inadequate.

Where ownership is transferred in exchange of ownership of some other property, the transaction is exchange. When ownership is transferred without any consideration, the transaction is called 'gift'. And, when ownership is transferred for money consideration, the transaction is called 'sale'. However, only the reference of money consideration is enough. Under Section 54 the money consideration (price) need not be paid at the time of transfer. It may be promised to be paid in future or, some part of it may be paid immediately and the rest may be paid in future.

Essentials of a Valid Sale.—Essentials of a valid sale are as under:

1. The parties i.e. the seller and the purchaser are competent.

1. *Vijay Kumar Sharma v. Dadesh Behari Sharma*, AIR 2008 All 66 (DB), the ownership of a plot was transferred for a consideration of rupees 20 lakh. The document was held to be a sale not lease. *Shammi Agarwal v. Subhendu Choudhary*, (2008) 7 SCC 716, the right of transfer and alienation becomes vested in the transferee, it has not to be specifically conferred on him. The burden of proof that the name of the seller in sale deed was entered into by mistake was held to be on the party who was saying so. *Significant Bank v. Estate Officer and Manager, APHC Ltd.*, AIR 2007 SC 3169, for acquisition of complete title to immovable property, the only permissible mode for the same is as provided in Section 54. *Udai Singh v. Laxmi Prasad Singh*, AIR 2013 SIK 21 the scribe and witness appeared to prove execution of the document of sale, enough proof, it was immaterial that the executant did not enter in the witness box.

2. *Jai Narain Pattnayak v. Pashpa Devi Singh*, (2006) 7 SCC 756.

2. The subject matter i.e. the property is in existence.
3. The money consideration i.e. the price has been fixed or referred.
4. The conveyance i.e. the transfer has been made as prescribed under the law.

1. The Parties : Seller and Purchaser : Competence.—There are two parties in a sale. The transferor is called seller and the transferee is called purchaser. Seller and purchaser are also known as vendor and vendee.

Seller and purchaser both must be competent on the date when the sale is being made. The seller must be competent to contract i.e. must be of sound mind and must have attained the age of majority. Competency alone is not sufficient. The seller must also have the right to sell the property. Since only ownership may be transferred in a sale, therefore, the seller must be owner of property at the time of effecting the sale. A tenant is not competent to sell the property under his tenancy because he has no absolute interest in that property. Moreover, the property must also be transferable property within the meaning of Section 6 of this Act. A seller has no right to transfer a non-transferable property.³

The purchaser may be any person provided he is not disqualified to purchase a property under any law enforced in India. For example, a judge, a legal practitioner or an official of the Court is incompetent to purchase actionable claims under Section 136 of this Act. Although a minor is not competent to contract but he is a competent purchaser. Sale in favour of minor is valid.

Two sisters, who were the only legal heirs of their deceased father, inherited property being Class I heirs. The husband of one of them purchased the property from their widowed mother taking advantage of her old age. It was held that the widow alone had no right to sell the property. The sale was not binding on Class I heirs to the extent of their share.⁴

An entire property was purchased by a person though he was aware that the seller had only half share in the property. The Court said that the seller, being not competent to deal with the whole property, the buyer acquired no title not even in the half share of the seller.⁵

Two defendants executed an agreement of sale in favour of the plaintiff. One of them was *karta* of the Hindu joint family and the other was a minor member. The property sold was a part of the joint family estate. The *karta* had entered into the agreement for family welfare and also for the benefit of the minor member. He did not intend to sell it for financial necessity. The agreement of sale was held to be a valid document. The plaintiff could not however enforce the agreement because he did not perform his part of it, nor showed his readiness and willingness to do so.⁶

3. *Ram Dass v. Shehal*, AIR 2009 SC 2735, a purchaser cannot get a better title than what the vendor had. An undivided share of a co-sharer may be the subject matter of sale, but possession cannot be handed over unless there is partition by metes and bounds amicably or either through mutual settlement or Court decree. No relief could be claimed on the ground of equity as the vendor purchased undivided share with full knowledge. *Aur Dulla v. Lalli Adini*, AIR 2013 Cal 176, a successor-in-interest is not competent to transfer during the lifetime of the owner.

4. *Kasturilal v. Bhanilal*, AIR 2008 NOC 1172 (M.P.).

5. *V. Ethiraj v. S. Sridhar*, AIR 2014 Kar. 50.

6. *Amrutsal v. Bhannagan*, AIR 2008 NOC 2889 (Mad.).

The husband of a Hindu female died. She married a Christian and converted herself to Christianity. It was held that she did not thereby lose her right of succession to her former husband's property. The sale of the suit property by her in favour of the plaintiff was held to be proper.^{7a}

Seller and buyer (purchaser) both may either be human persons or juristic persons. Thus, property may be sold by a corporation or registered firm or any other legal person. Similarly purchaser can also be juristic person.

2. Subject Matter : Immovable Property.—Sale is transfer of ownership in some property. This Act deals with sale of only immovable property. Sale of movable are dealt with under the Sale of Goods Act, 1929. The subject-matter of sale under Section 54 is, therefore, immovable property. An immovable property is either tangible or intangible. The subject-matter of a sale may be any kind of immovable property as defined in Section 3 of the Transfer of Property Act. Accordingly, the immovable property which may be subject matter of sale means land, benefit arising out of land and the things attached to earth. Things attached to earth include things embedded to earth, things attached to what is so embedded to earth and the things rooted in the earth. But, standing timber, growing crops and grass are movable properties. Therefore, except the standing timber, growing crops and grass, the land and all the beneficial interests in lands are included in the term immovable property. Interests such as right to collect rent, right of fisheries or right to extract minerals etc. are intangible immovable properties and may be sold.^{7b}

Mortgages-debts are intangible immovable property and can be sold within the meaning of Section 54. Reversion is also intangible property and is subject-matter of sale. 'Reversion' means the bundle of rights which remains with the lessor after giving his property on lease. Lease is transfer of only the right of enjoyment of property. After transferring this right, the lessor has ownership except right of enjoyment of his own property. Thus, 'reversion' is every thing equal to ownership and can be sold.

Equity of redemption is in reality a tangible immovable property. Therefore, sale of equity of redemption has been held as sale of tangible immovable property.⁸

However, the immovable property whether it is tangible or intangible must be in existence on the date of execution of sale. Further, the property must be owned by seller and must also be a transferable property within the meaning of Section 6 of this Act.

3. Money Consideration : The Price.—Price is an essential element in the transfer by way of sale. The money consideration which is called 'price', is an essential element of a sale. The price must be fixed or referred in the sale-deed. Its payment is not necessary for completion of the transfer but its reference is

7a. *K. Shanmugam v. Manjuthammal*, AIR 2012 Mad 30, *Heminder Kaur v. Sharm Kanta Janya*, AIR 2014 NOC 6 Del, plaintiff not proved to be sole owner and therefore not entitled to whole of the sale price.

7b. For detailed account of immovable properties recognised under the Act, see, the commentary given under section 3.

8. *Jainarain Parasmipathi v. Pishpa Devi Sirohi*, (2006) 7 SCC 756, sale of house-bungalow was held to be a sale alongwith the land on which it was built.

8. *Sobhan Lal v. Mohan Lal*, AIR 1928 All. 726.

necessary. The price may be paid at the time of execution of the sale-deed. It may be paid in advance or after execution of the deed. Some part of it may also be paid at the time of execution and the rest may be promised to be paid in future.^{8a} If no price has been mentioned or ascertained in the sale deed then even a registered sale deed may not be regarded as sale. FRY ON SPECIFIC PERFORMANCE observes :

"In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable, and contract of sale is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined or it may stipulate for a price".⁹

The consideration, in the sale has specifically been mentioned as 'price' in Section 54. Price must be money consideration. If the ownership is transferred in not been defined in Section 54. But, it has been held that under this section it is used in the same sense as it has been defined in the Sale of Goods Act and means the money consideration.¹⁰ Money consideration may include any form of money e.g. currency notes, coins, cheques or bank draft. However, in its wider sense it has been held that an advance made by one brother to another is a good consideration for sale.¹¹ Similarly, a debt which is already due to the transferee has been regarded as 'money' and transfer of ownership in exchange of such debt has been held a sale.¹²

Where, under family settlement a party agreed to give up his share in property and agreed to sell that property to another party, this agreement of settlement was regarded as 'consideration' for sale. In a family settlement a party agreed to give up his rights in respect of the share in property. He executed an agreement to sell that property to another party to settlement. The Andhra Pradesh High Court held that "settlement can be considered as a consideration for execution of agreement of sale".¹³

Under Muslim Law, wife's claim of her dower is regarded as a debt. Where a Muslim husband makes gift of a land in lieu (consideration) of her unpaid dower, the transfer is not a gift but a sale because ownership is transferred in consideration of dower which is money debt.¹⁴ Such transaction is known under Muslim Law as *Hiba-bil-Ewaz* having all the legal incidents of sale.

8a. *Karmanna Sambamurthy v. Kalipatnam Althumma*, AIR 2011 SC 103 : (2011) 11 SCC 153, immovable property agreed to be sold for a consideration, a part of which was paid in advance, at the time of execution of the deed and remaining amount was made payable at the time of registration within the time fixed. The agreement was held to be one of sale constituting a concluded contract. *Masudin Yedra v. Mada Leds P. Ltd.*, AIR 2014 NOC 295 Delhi, there is no bar to purchaser paying the entire sale price in advance. *Udai Septon v. Laxmi Prasad Septon*, AIR 2013 SIK 11, the words used in the document were "Chand Bilal" which meant complete sale, the document began with the words "He is giving a written money receipt", held it was a sale deed and not merely money receipt.

9. Cited in *Mulla; TRANSFER OF PROPERTY ACT*, Ed. VII, p. 293.

10. *Commissioner of Income-tax v. Motors & Car Store Pvt. Ltd.*, AIR 1967 SC 200.

11. *Atish Chandra v. Chhota Nalgur Boring Corp.*, AIR 1948 Pat. 294.

12. *Muslim Pillai v. Bhadrakali Ammal*, AIR 1922 Mad. 311.

13. *Kangolia Lakshminaray Rao v. Gudimella Karim Menabegam*, AIR 2003 AP 241.

14. *Saharanmusa v. Subul Saad*, (1934) Cal. 693.

Inadequacy of consideration (price) is not any relevant factor for validity of a sale. Even where the price is found to be less than the market value of the property, the sale is valid. In *Hakim Singh v. Ram Santhi*, the sale deed was challenged on the ground that sale consideration (price) was very low but no reliable evidence could be produced regarding the market value at the time of agreement. Allahabad High Court held that the sale was valid. The plea of inadequacy of sale consideration was rejected.

But, if the price money is too less or illusory, there might be an apprehension of fraud, coercion or mistake of fact. If the fraud or mistake of fact etc. is proved before the Court the sale may be invalidated.

Every valuable thing may not be regarded as 'price'. Thus, if the consideration for sale is not money but forbearance to sue (i.e. the transferee shall not file suit against transferor) the transfer is not sale.¹⁵ Similarly, transfer of a land for 'work done in cleaning a piece of land and digging a well' was not regarded as sale because although 'work done' was of some value but not 'money'.¹⁷

Non-Payment of Price.—Payment of price (consideration) is not *sine qua non* (must) for completion of the sale. The ownership or title is transferred from seller to purchaser even if no actual payment of price has been made provided there is specific mention of the price and the mode of its payment. Since the sale of immovable property may be effected in exchange for the price paid or promised to be paid, mere non-payment of consideration (price) will not arrest (prevent) the passing of the title.¹⁸

In a decision of the Supreme Court under Section 55 (4) (b) vendees had not paid the sale consideration at the time of execution of the sale deed and its registration. There was a recital in the sale deed that the vendor had received the entire sale price from the purchaser and the vendor had relinquished title and transferred possession. The Supreme Court said that such recital was of no consequence. The registration receipt was retained by the vendor to be exchanged in consideration of the sale price. Possession was also not delivered in fact. It could be said that the sale in favour of the vendee had not taken effect. Consequently repudiation of the sale by the vendor and re-sale in favour of the subsequent purchaser was valid.^{18a}

4. Conveyance : Mode of Transfer.—Sale is transfer of ownership of an immovable property. Property therefore must be transferred from seller to purchaser. Part two of Section 54 provides two modes of transfer of property : (a) delivery of possession and (b) registration of the sale deed.

15. AIR 2001 All. 231.

16. *Mahima Bysedate v. Dhanabai*, AIR 1960 Ori. 16.

17. *Gulam Muhammad v. T. Chandra*, AIR 1921 Lahore 82.

18. *Dulara Devi v. Belram Sahu*, AIR 1939 Ori. 59 ; *Jales Yedra v. Raghunath Yedra*, AIR 2009 NOC consideration money had been paid, possession delivered and the purchaser was put in complete ownership of the property.

18a. *Janki Dulari Devi v. Kapildas Rao*, AIR 2011 SC 2521, vendees were not entitled to an order of sale under the Specific Relief Act in their favour because of non-payment. *Bharati v. Nagesh*, AIR 2012 All. 91, there was recital in the sale deed that consideration had already been paid, but it turned out to be incorrect. The Court held that the transaction, did not amount to deed was set aside.

(a) *Delivery of Possession*.—Where the property is tangible immovable property of a value less than rupees one hundred the sale may be made by delivery of possession. Writing and registration is not essential. However, if the parties so desire, they may get the sale deed registered. Thus, in case of tangible immovable property valuing less than rupees one hundred, registration is not compulsory; it is optional. The simple method of delivery of possession in the case of sale of tangible immovable property of value less than rupees one hundred has been provided because of the small sum of money involved in the transaction.¹⁹

Oral sale of immovable property, which is possible only when the market value is less than Rs. 100, is completed merely by delivery of possession. However, the Court must satisfy that the entire price has been paid to the seller.²⁰ Delivery of possession here means giving physical control of the property to buyer. In *Mohiuddin v. President, Municipal Com., Kharagpur*,²¹ a piece of land was sold for less than Rs. 100. There was unregistered sale deed. No physical possession could be proved. The Court held that the transaction of sale could not be proved to have been taken. Where actual physical possession amounts to change in possession from seller to buyer, anything done by seller which is not possible due to nature and kind of property, anything done by seller which amounts to change in possession from seller to buyer is deemed to be a delivery of possession. For example, possession of a house can be given by seller either by allowing the purchaser to reside in it or handing over its keys to him. Similarly, in the case of land the possession is delivered to purchaser when he goes to the land or otherwise shows his physical control over it.

Where the purchaser is already in possession of the property declarations and acts so as to change the previous possession into that of the purchaser is sufficient. In other words, if the vendee is already in possession of the property sold to him; it is not necessary that there should be any formal taking over of the possession. A direction is sufficient to constitute delivery of possession.

It has been held that during the subsistence of a usufructuary mortgage, the mortgagee can claim title over a part of the mortgaged property on the basis of an oral sale. The mortgagee had purchased a part of the mortgaged property for due consideration under an oral sale. It was held that an oral sale is not in contravention of Section 54.²²

Delivery of possession is not necessary where the sale deed has been executed and registered. Though the sale deed stated that possession was delivered, in fact there was no delivery. The Court said that this fact could not in itself be taken to mean that the transaction was not of sale, or that it was merely a transaction of loan.²³

(b) *Registration of Sale-deed*.—Except in the sale of tangible immovable property valuing less than Rs. 100, in all other cases of sale of immovable property, registration is compulsory. Registration is necessary to complete the sale in the following cases:

(i) Where tangible immovable property is of the value Rs. 100 or more, and

19. *Bhaskar Gopal v. Padman Hira*, (1916) 40 Bom. 313.

20. *Vikas Agrawal v. Sujda Begum*, AIR 2008 NOC 2177 (Utr.), an oral agreement of sale is not recognised. It has to be in registered writing.

21. AIR 1993 MP 5.

22. *Bhikari Naik v. Baban Saloo*, AIR 2009 Ori 38.

23. *Korun Malawan v. Nageshwar Pandey*, AIR 2015 NOC 86 (Del.).

(ii) Where the property is intangible immovable property of any valuation.^{24a}

State of Uttar Pradesh.—In the State of Uttar Pradesh, registration is compulsory even if the value of the tangible immovable property is less than Rs. 100. Section 30 of the Uttar Pradesh Civil Laws (Reforms and Amendment) Act 1976 provides that in the second paragraph of Section 54 of the Transfer of Property Act, the words "value of one hundred rupees and upwards" shall be omitted. It provides further that, "the third and the fourth paragraph shall be omitted". The result of the above-mentioned amending provisions is that in the State of Uttar Pradesh the sale of any immovable property cannot be made without registered document. Thus, in this State sale of a house valuing less than Rs. 100 must be completed only through a registered deed.

The general rule is that a registered instrument is absolute necessity in cases both of tangible immovable property worth Rs. 100 or more, and intangible immovable property of any valuation. Intangible properties (beneficial interests or reversion) must be sold only by a registered sale deed even though the consideration involved is less than Rs. 100. Right to catch and carry fish is regarded as intangible immovable property. Therefore, it must be sold by a registered instrument.²⁵ The Indian Registration Act, 1908 provides the process of registration of documents. Registration starts with writing of the transaction on stamp papers of requisite value, it is signed by the executant, attested by two competent witnesses and is then presented before the Registering Officer. Thereafter, the document is copied out and put in the records of the Registration Office. The Registering Officer then certifies that the document has duly been registered on the date and at a time mentioned by him. Registration is deemed to have been completed only after it has been recorded and is certified to have been registered.²⁶ Registration is, therefore, a statutory mode of making the sale of immovable properties.

Sale deed of Movable and Immovable Both.—Where movable and immovable property the registration of which is compulsory has been sold for a single consideration i.e. at one price and the sale deed is not registered then, the whole transaction becomes ineffective. Non-registration of such sale deed would render the sale of also movable property ineffective although registration of such sale is not compulsory.²⁷

When Ownership is Deemed to be Transferred?—In the sale of movable properties, ownership or title is transferred from seller to buyer as soon as the buyer takes possession of the property. In the case of sale of tangible immovable properties valuing less than Rs. 100, the title passes on to the buyer when he gets possession of the property.

Where the sale is to be completed only by registered instrument, the ownership is deemed to pass on to buyer on the date of execution of the sale-

22a. See *Sunil Lamp & Industries P. Ltd. v. State of Haryana*, AIR 2012 SC 206, emphasising the requirement of registration and overruling the decision of the High Court of Delhi in *Asim M. Jain v. Citin Bank*, (2001) 94 DLT 841, there can be no valid substitute for sale deed.

23. *Bihar Eastern Gangetic Fishermen's Society v. Sipahi Singh*, AIR 1977 SC 2149; *Ram Senarup v. State of M.P.*, AIR 2014 MP 59, where under a State Amendment registration for property of any value, an unregistered sale deed would create no enforceable right.

24. *Ram Saran Lal v. Domini Kuer*, AIR 1961 SC 1747.

25. *Bhathi Dutt v. Ram Lal Bygmal*, AIR 1934 Rang. 303.

deed, not on the date when the deed was registered. According to Section 47 of the Indian Registration Act, 1908 a registered instrument operates from the time from which it would have commenced to operate if no registration thereof had been made. In other words, although in cases of sales where registration is compulsory, the sale is not complete until registration but once registration is made it will relate back to the date of execution and title would be deemed to have passed on that date. Registration does not create a new title but only affirms the title which was created by sale deed.²⁶ But the date of execution may be regarded as the exact date of the passing of title only where it is clearly ascertainable in the deed. If it is doubtful or the deed itself lays down any condition precedent for transfer of ownership, the title is deemed to pass on accordingly. That is to say, the true test as to when the title shall pass on to the buyer is the intention of the executant.²⁷

Registration is the *prima facie* proof of the intention of seller that he wanted to transfer the ownership on the date of execution. But, when some condition has been laid down in the deed itself the title shall not pass on to the buyer until that condition is fulfilled. For instance, where the deed provides that the title shall pass on only upon the payment of full consideration, the title of the property shall be transferred to buyer only upon the payment of full price. In such cases, the transfer is postponed till the fulfilment of the condition e.g. payment of price. The sale deed may also provide that if the price is not paid within a specified date, the transfer shall be void. In such circumstance the title cannot pass (despite execution and registration) until the price is paid within that date.²⁸ In *Laxmi Narain Barmal v. Jagdish Singh*,²⁹ the Patna High Court has rightly observed that the question as to whether on the execution of the deed of sale title passes to vendee or not depends upon the intention of the parties. The Court further observed that the title of the vendor passes to the vendee on registration of deed irrespective of fact as to whether consideration in whole or in part, has been paid by the vendee to the vendor or not subject, of course, to the contrary intention of the parties to the said transaction.

When an immovable property is sold, there is transfer of ownership or absolute interest of that property. In view of Section 8 of the Act, the title passes forthwith upon the registration of the deed to the transferee with all the interests which the transferor has been capable of passing in the property and in the legal incidences thereof unless different intention is expressly or necessarily implied.³⁰ For instance, in the sale of house the purchaser becomes entitled to the doors, windows etc. and the rents, if there is, a tenant in it. He is

26. *Chander Singh v. Janana Pt. Singh*, A.I.R. 1958 Pat. 193.

27. *Kallaperumal v. Rajagopal*, AIR 2009 SC 2122, execution and registration of sale deed is not sufficient to prove passing of title and ownership in favour of the purchaser. Intention of the parties has to be ascertained. *Latishindhar Malik v. Sridhar Malik*, AIR 2009 Ori 122, title *prima facie* passes with registration of sale deed. Such sale deed cannot be subsequently cancelled for giving a better title to the subsequent buyer.

28. *Bakhtinwar Ram v. Nandlal*, A.I.R. 1920 55 I.C. 659.

29. A.I.R. 1991 Pat. 99.

30. *Harbans Singh v. Tekamuni Devi*, A.I.R. 1990 Pat. 26; *Amar Chand v. Madan Lal*, AIR 2008 NOC 1648 (H.P.), the vendor (plaintiff) was in need of money. He sold his land for money consideration. The sale deed as executed by him was registered. Intention of the parties was transfer of interest in the land for valuable consideration. The transaction was a sale. The plaintiff being no longer the owner, could not interfere in the buyer's (defendant) possession.

also entitled to easements, if any, unless contrary intention is expressed in the sale deed. In *Khinia Devi v. Rameshwar Rao*,³¹ it was provided in the sale deed that all rights and privileges in and concerning the suit property either at present or accruing in future, which vested in the vendor were the subject matter of sale and that vendor retained no right of any kind whatsoever. It was held by the Supreme Court that right of reconveyance under contract for sale was (also) transferred by this sale deed.

No unilateral cancellation of transfer.—Once the vendor has divested himself of the ownership of his property, he retains no control or right over the property. The transfer by way of sale was made absolute by transfer of property from vendor to purchaser. The Court said that such transfer could not be annulled or cancelled unilaterally by the vendor by executing a deed of cancellation. Such deed of cancellation cannot be accepted for registration. Cancellation of a sale deed can be ordered only by the Court under Section 31 of the Specific Relief Act, 1963.^{32a}

Will and Succession.—By two registered Wills property was dedicated in the name of "Allah". They were revoked by a third Will. Reason for revocation was given. The testator declared by this Will that after her death the property would devolve upon the beneficiary of the Will. After death of the beneficiary, the testator's son would become the owner. Ownership thus devolved upon the son. He became entitled to dispose of the property by sale deed.^{31b}

CONTRACT OF SALE

Section 54 defines also 'contract of sale'. According to this section, a contract sale of immovable property is a contract that sale of the property shall take place on terms settled between the parties. In every sale there is preceding contract of sale.³² Upon due execution of the contract, the property is transferred from vendor to vendee. Thus the sale is completed in furtherance of that very contract. Such contract may be called 'contract of sale' or 'agreement to sale'.

But, 'contract for sale' is a different thing. Sometimes, the parties are unable to execute the sale deed at present but they intend that sale would take place between them in future. In order to have an evidence and permanent proof of their intention, they enter into an agreement that the property would be sold to the other contracting party and to nobody else. This agreement is called 'contract for sale'. In a contract for sale, the intention of the parties (as expressed therein) is not to effect an immediate transfer of ownership but to agree to do the same in future on the terms settled between them.

The last paragraph of Section 54 clearly says that a contract for sale does not itself create any interest or charge on the property. No title or interest in respect of the property is therefore, created in favour of the purchaser on the

31. A.I.R. 1992 SC 1482.

31a. *Latif Estate Line India Ltd. v. Habibji Aminul*, AIR 2011 Mad 66 (F.B.); *V. Ethiraj v. S. Sridani*, A.I.R. 2014 Kar. 58, registered settlement deed not allowed to be cancelled by unilaterally executing cancellation deed, not allowed to be registered.

31b. *Aqueel Ahmad v. Mohd. Moht. Moht.*, A.I.R. 2014 NOC 303 All.

32. Every transfer of property whether it is sale, gift or lease etc. is preceded by a contract. There cannot be any transfer without any express or implied preceding contract. The transfer of property completes the contract of transfer.

basis of such contract. Under English Law, a contract for sale creates an equitable ownership in favour of the purchaser and the vendor holds property for him as a trustee. But the doctrine of equitable estate is not recognised in India. Therefore, the contract for sale creates neither legal estate nor equitable estate in favour of the transferee (purchaser). It is well settled law in India that existence of an agreement for sale does not of itself create any interest in or charge upon such property.³³ Accordingly, even if the purchaser has paid the consideration and had taken possession on the basis of such contract, he cannot get ownership unless a sale deed is duly executed in his favour.

Contract for sale is, therefore, merely a document creating a right to obtain another document namely, a duly executed sale deed. Such a contract need not be registered even though it is mentioned in the document that a part or the whole price has been paid by the vendee. The contract for sale is purely a contract within the meaning of the Indian Contract Act. A person who enters into such a contract does not become entitled to any interest in the land for the sale of which the contract was made. So, he cannot apply to restrain or set aside the execution of a sale deed of the same land to another person. In *Jagan Nath v. Jagdish Rai*,³⁴ there was an agreement to sell an immovable property with a person (P1). Subsequently, the owner entered to another agreement to sell the same property to another person (P2). It was established that subsequent purchaser was a *bona fide* purchaser for value without notice of earlier agreement. The Supreme Court held that the person (P1) with whom the owner made first agreement of sale would not be entitled to relief of specific performance against the subsequent purchaser (P2).

However, the purchaser is not without remedy. Equity protects his interest. The purchaser under a contract for sale has following rights:

- (i) He may file a suit against the vendor for specific performance of this contract, under the Specific Relief Act, 1963. That is to say, he may compel the vendor to execute the sale deed in his favour. The Court would normally grant him relief unless the vendor shows some special reason for not selling the property to him.
- (ii) If the purchaser has paid some price, he may acquire a charge upon the property for the money which he had paid and, is entitled to get it back.³⁵

The contract for sale does not provide any other right to the purchaser. If the purchaser has taken possession on the basis of such contract, he cannot defend his possession under Section 53-A of this Act. The doctrine of part-performance is applicable only to those documents which are duly completed otherwise (e.g. properly stamped) except registration. So, under Section 53-A of T.P. Act the possession cannot be defended on the ground of existence of a contract for sale.³⁶

33. *Lachman Nupur v. Badan Kojali Suman*, A.I.R. 1989 Oct. 154; *Crest Hotel Ltd. v. Asstt. Supt. of Stamps*, A.I.R. 1994 Bom. 228; *Baboo Lal v. Nishi Lal*, A.I.R. 2014 NOC 201 All, Section 8 of the Hindu Minority and Guardianship Act, 1956 is not attracted to such agreement because no rights are created under it.

34. A.I.R. 1998 SC 2028.

35. See Section 55 (6) (b) of the Transfer of Property Act.

36. *Sunil Kumar Jain v. Kishori*, AIR 1995 S.C. 1891; *Mun Pir Bux v. Sardar Md. Tahir*, A.I.R. 1934 P.C. 235.

The right to seek ejectment on the basis of sale agreement has been recognised. In this case, by virtue of a sale deed, the plaintiff transferee was put in possession of the suit property by the original owner. The transferee was also permitted by the original owner to collect rents from his tenants. The Court said that all this showed that the transferee was put in constructive possession of the suit property. He stepped into the shoes of the landlord *qua* Sections 53-A and 109. It was held that the transferee was entitled to seek eviction of the tenant from the suit premises. This was so irrespective of the fact that the tenant had been paying rents to the original owner.³⁷

Note.—In the State of Uttar Pradesh, a contract for sale can be made only by a registered instrument. [Section 30 of the Uttar Pradesh Civil Laws (Amendment) Act, 1976]. Therefore, although the general rule is that a contract for sale need not be registered but, if the property is situated in the State of Uttar Pradesh, the contract for its sale must be registered.

Development agreement.—A development agreement is also an agreement for sale subject to certain conditions. It is an agreement for conditional sale. A suit at the instance of a developer is not prohibited by Section 14 (3) (c) of the Specific Relief Act, 1963. A suit by developer for specific performance is maintainable.³⁸

Hire-Purchase Agreement.—Hire-purchase agreements are not sale. The ownership of the property is not transferred to the transferee on the basis of such agreements. Normally, the practice is that there is an agreement between seller and purchaser under which the purchaser takes possession of the property and agrees to pay the consideration in instalments. The payment of full consideration is made in several instalments. But these instalments are not paid in future. In the mean time, there is an option with the purchaser to refuse the sale. The seller has also a right to terminate the sale. Thus, unless all the instalments have been paid as agreed upon between the parties, the agreement to purchase the property itself is not completed. In *K.L. Jallur & Co. v. Dy. Commercial Tax Officer*,³⁹ the Supreme Court held that a hire-purchase agreement has two aspects. First, the purchaser takes the property subject to payment of consideration in instalments and secondly, the instalments become price when the purchaser exercises his option to purchase by making full payment. Further, if the agreement for sale provides that the seller would have the option to repudiate the contract on breach of any condition specified by him, the contract may be repudiated by him upon such breach. In the contract for the sale of house on monthly payment of price it was agreed between the parties that time schedule for monthly payment and promptly was important. The purchaser couldn't pay the monthly instalment. It was held by the Court that the seller was entitled to repudiate the contract for sale and that the Court cannot exercise its discretion to grant specific performance in such case.³⁹ The distinction between sale and hire purchase agreement is that if the transferee has to pay the entire price, it is indicative of sale whereas if the transferee is given the right to terminate the agreement before full payment, the transaction is a hire purchase agreement.

37. *Mujumdar & Co. v. Fazlur Rehman*, AIR 2008 Kant 32.

38. *Asitok Kumar Jaiswal v. Ashim Kumar Kar*, A.I.R. 2014 Cal. 92 FB.

39. A.I.R. 1965 S.C. 1082.

39. *Jyoti P. Hanumanji v. Rose Elynn D'Souza*, AIR 1995 A.P. 189.

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Agreement for re-conveyance.—It has been held that a deed of gives only concession or privilege to the beneficiary of re-conveyance. It does not require registration under Sections 17 and 18 of the Registration Act. Section 54 of TPA is also not applicable. The Registration Act also does not bar cancellation of such deed.⁴⁰

Where the words for reconveyance were entered into the sale deed after its execution and before registration, and this was done without knowledge or consent of the buyer, he was held not bound by such words, he not knowing that he was signing an altered document.^{41a}

Distinction between sale and contract of sale

Both the expressions "sale" and "contract of sale" are defined in Section 54. The points of difference are as follows:

1. A sale is the transfer of ownership in exchange for a price paid or promised. In a contract of sale, on the other hand, there is a contract that sale shall take place on terms settled between the parties.
2. Since, a sale is transfer of ownership, it vests ownership in the transferee with immediate effect. A contract of sale, on the other hand, does not create any interest in, or charge on, the property in question, which is the subject matter of contract of sale.
3. In both cases there is an underlying contract. Every transfer of property whether by sale, gift or lease, *in present or futuro*, is preceded by a contract.

There cannot be any transfer without an express or implied underlying contract. The transfer of property is a completion of the contract of transfer or a contract for transfer.

Distinction between "Contract of sale" and "Contract for sale"

A contract of sale is a completed contract in its terms. On such terms the transfer of property is to take place. In a contract for sale, on the other hand, the parties are not in a position to execute the sale deed at present. In order therefore to create a permanent proof of their intention they enter into an agreement that the property would be sold to the contracting party and none else.

Distinction between Sale and Exchange.—Sale is transfer of ownership in a property in exchange of price which is the money consideration. On the other hand, exchange is transfer of ownership in a property in exchange of ownership of another property. Both are transfer of absolute interest in the property but, in sale the consideration is money whereas in exchange, it is another property or, anything of value. Section 118 of this Act defines exchange in the following words:

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange."

Note.—A transfer of ownership of money in return of money is called exchange. It is not sale. For instance, transfer of one ten rupee note in exchange of ten notes of one rupee is an exchange.

Distinction between Sale and Gift.—In sale and gift both, there is transfer of ownership of an immovable property. But in sale the ownership is transferred in exchange for a price i.e. the consideration is money. In gift, the ownership of an immovable property is transferred without any kind of consideration. The consideration in gift is neither money nor any thing of value.

Except in the State of Uttar Pradesh, sale of immovable property of value less than Rs. 100 need not be made through registered instrument. But gift of an immovable property must be made only by a registered instrument irrespective of the valuation of property.

Punjab.—In Punjab where the Transfer of Property Act is not in force, Section 54 was also not enforceable, and an oral sale of immovable property was valid. But now since April 1955, paragraphs 2 and 3 have been made enforceable throughout the State of Punjab. The result is that like rest of the country, in Punjab too sale of an immovable property valuing Rs. 100 or more must be effected by a registered instrument.

55. Rights and liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound —

- (a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary case discover;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all

40. *Ram Sagar Devi v. Chulani Devi*, AIR 2008 Pat 157.
41a. *D. K. Rathnamurthy v. Ramappa*, (2011) 1 SCC 158.

incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undamaged, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase money, or any part thereof remaining unpaid and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest;

(b) to pay or tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs; provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the person entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (i), clause (a) and paragraph (5), clause (a) is fraudulent.

SYNOPSIS

- Seller's Duties (Liabilities) before the Sale.
- Disclosure of material defects : Sec. 55 (1) (a).
- Production of title-deeds : S. 55 (1) (b).

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- Answer relevant questions as to title: S. 55 (1) (c).
- Duty to execute conveyance: S. 55 (1) (d).
- Care of property and title-deed: S. 55 (1) (e).
- Payment of the outgoings: S. 55 (1) (g).
- Seller's Duties (Liabilities) after the Sale.
 - Giving possession of property: S. 55 (1) (f).
 - Covenant for title: S. 55 (2).
 - Delivery of the title-deeds: S. 55 (3).
 - Seller's Rights before Sale: S. 55 (4) (a).
 - Seller's Right after Sale: Seller's Lien or Charge: S. 55 (4) (b).
 - Interest on Unpaid Price.
 - Transfer of Sellers Charge.
 - Exclusion of the Charge.
 - Seller's Lien in Punjab.
 - English Law.
- Buyer's Duties before Sale.
 - Duty of disclosure: S. 55 (5) (a).
 - Payment of price: S. 55 (5) (b).
- Buyer's Duties after Sale.
 - To bear the loss to property: S. 55 (5) (c).
 - To pay the outgoings: S. 55 (5) (d).
- Buyer's Rights.
 - Buyer's Right before Sale: Buyer's Charge: S. 55(6) (b).
 - Buyer's Right after Sale: S. 55(6) (a).
- Effect of sellers title failing.

RIGHTS AND LIABILITIES OF SELLER AND BUYER

In the Absence of a Contract to the Contrary.—Sale is a transfer of ownership. In other words, in a sale there is transfer of absolute interest of the property. After completion of the sale all the rights and liabilities in the property, which are owned by seller, pass on to the purchaser. But since the seller is the owner of his property, he has full liberty of transferring it to the buyer on any terms and conditions as he likes. Law permits a person to sell the property on his own terms and the purchaser may agree to take the property on such terms. In such circumstance, the rights and liabilities of the seller and the buyer would be subject to those terms and shall not be governed by the provisions of Section 55. In case, there is any specific condition subject to which the sale is being made, it must be clear and unambiguous.

If there is no special agreement regarding the respective rights and liabilities of the seller and buyer i.e. where the sale-deed is silent, it is presumed that there is an open contract of sale. In the case of open sale (which is the normal practice) the absolute interest of the property is transferred by

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seller to the buyer without any terms or conditions. Section 55 deals with the respective rights and liabilities of seller and buyer 'in the absence of any contract to the contrary'. That is to say, the rights and liabilities as given below, are for an open sale in which the sale-deed is silent about rights and liabilities of the seller and buyer.

The rights and liabilities (duties) of seller and buyer, as given in this section, have been divided into two categories: (a) The rights and liabilities *before* the sale and (b) the rights and liabilities *after* the sale. The reason behind this classification is that sale is a transfer of property the process of which begins with the constitution of contract and ends with transfer of ownership (title) from seller to buyer. Therefore, the rights and liabilities before the completion of sale are contractual in nature. Whereas the rights and liabilities after the sale are proprietary in nature i.e. concerning ownership of property.

SELLER'S DUTIES AND RIGHTS

Seller's Duties (Liabilities) before the Sale.—Before the sale is completed, the seller's duties are as under:

- (i) To disclose material defects in the property or title, if any.
- (ii) To produce the title-deeds for inspection.
- (iii) To answer relevant questions as to title.
- (iv) To execute conveyance.
- (v) To take care of the property and title-deeds.
- (vi) To pay the out goings.

(i) **Disclosure of material defects:** Sec. 55 (1) (a).—Before completion of sale, the seller is bound to disclose to the buyer any *latent material defect* in the property or any defect in his own title (ownership rights).

The defect in the property which the seller is bound to disclose is a defect which is known to the seller but the purchaser is not aware of it. The buyer would be unaware of the defect if he is unable to know it because it is not apparent or visible. Where the defect is of such a nature which is apparent and patent, for example, where the property is a house with cracked or broken walls, the defect in the house is patent. Where the defect is patent the seller has no duty to disclose it and the rule of *caveat emptor* (purchasers be aware) shall apply. Under this section the seller has duty to disclose only *latent material defect*. Defect is latent when it cannot be seen or discovered by a man exercising ordinary prudence and care. A latent defect is hidden or concealed would be a latent defect because the buyer cannot see it while inspecting the land.

The defect in the property which the seller is bound to disclose to the buyer must not only be latent but must also be a material defect. Defect is material where it is of such nature that if it was known to the buyer, he would have

either not purchased the property or would have agreed to take it at lesser price. In other words, the defect is not petty or negligible. It is relevant to such an extent that had this been known to the buyer it would have materially affected the transaction.

Defect in the title or ownership rights of the seller is a latent defect which must be informed by the seller to buyer. A right of easement would restrict the full enjoyment of the land, therefore, easements are regarded as latent material defect in the title and seller is bound to give full information to the buyer. Restrictive covenants also restrict the full ownership rights and, therefore, amount to latent material defect in title. Failure to disclose a partition decree affecting the property or encumbrances on it, is also failure on the part of seller to disclose latent material defect.

Where a seller does not disclose to the buyer any latent material defect in the property, the buyer has a right to repudiate the contract of sale on the ground of misrepresentation. The buyer is also entitled to claim damages for the loss incurred by him due to such rescission of contract. If seller compels the buyer to take the property by filing a suit for specific performance of contract, the buyer may resist such suit on the ground that he was misrepresented by the seller. The burden of proof of misrepresentation is on the vendee. The essence of any claim for repudiation of contract of sale or claim for compensation under this clause is that the vendee has been misled by the vendor.

The purchaser deposited earnest money on clear understanding that there would be an independent approach road to its working unit. The seller failed to disclose the non-existence of any such passage to property. The purchaser did not make any further payment. The forfeiture of the purchaser's money was held to be wholly arbitrary and unfair. The seller could not take advantage of his own wrong in not disclosing the truth about the property.^{40a}

(ii) *Production of title-deeds* : S. 55 (1) (b).—The next duty of the seller is to produce the title-deeds of the property for inspection if buyer demands it for his satisfaction. However, there is no duty to produce the title-deeds unless it has been demanded by the purchaser. But, if demanded, the seller must produce it within reasonable time even if the agreement requires them to be produced "forthwith".⁴¹ If the buyer requests the seller for the title-deeds for his inspection, the seller has a duty to produce not only those documents which are in his possession but also to make arrangements for the inspection of also those documents which are within his power. For example, where the title-deeds are in possession of the mortgagee, they are not in seller's possession but in his power. Where the deeds are not in seller's possession the buyer has to bear the cost which would be required for obtaining or inspecting the records of title. The place where buyer may inspect or verify the title-deeds has not been given in this clause. But, normally the buyer provides the documents at his (buyer's)

40a. *Haryana Financial Corp. v. Rajesh Gupta*, AIR 2010 SC 338. A. K. Lakshminipathi v. Penna Lal H.

Lakshmi Charitable Trust, AIR 2010 SC 577, there was no clause in the contract that the vendor would obtain a certificate from the Endowment Deptt. for transfer of the property. Hence, the vendor was under no such obligation.

41. *Itendran Nath v. Maheshwari Bosc*, AIR, 1965 Cal. 45.

residence or at his attorney's place or office. However, the seller's duty is merely to produce the title-deeds for inspection, not to handover the documents to the buyer.

Seller's duty to produce the title-deeds for inspections arises only when the buyer request him for the same. If buyer does not demand, the seller has no such duty. Where the buyer has not requested inspection of title-deed, the Court shall presume that he was fully satisfied with the authority and title of the seller. In other words, if a buyer does not inspect the deeds, he would be fixed with constructive notice of any defect in seller's power of transfer if so found later on.

Failure to produce title-deeds for inspection by the buyer on his demand entitles the buyer to repudiate the contract of sale and claim also the refund of the earnest money (if any) with interest.⁴²

(iii) *Answer relevant questions as to title* : S. 55 (1) (c).—Since a buyer has to get ownership of the property it is in his interest that he must be fully satisfied with the ownership rights of the seller and his authority to effect the sale. Therefore, inspection of the title-deeds is not enough. There might be certain doubts in the deeds which must be removed before execution of the sale-deed. Accordingly, the seller's next duty is to answer all questions put by the buyer which are relevant for passing of the title. The questions regarding title may be regarding identity of the property, due execution of the sale-deed by competent persons or the validity of the attestation of the deed. Rents being received from the property is a material question which may be asked by the buyer and which the seller is under duty to inform. It is the duty of the seller to answer all specific questions material to his title. Such questions are in the nature of objections which may not *per se* (as such) indicate clear title. Therefore, they are called requisitions on title. However, if a buyer has not the least doubt about the perfect title of the seller, he may not ask any question at all and may thus forgo his rights to requisitions. In such a case the buyer is said to have waived his right and then the seller has no duty.

(iv) *Duty to execute conveyance* : S. 55 (1) (d).—The seller's next duty is to execute the conveyance. That is to say, he has to effect the transfer of ownership. This is done by signing or affixing thumb impression on the sale-deed by the seller. Where the seller does not sign or affix his mark on the sale-deed, there is no execution of the sale-deed.⁴³ A third party cannot write the name of the vendor so as to make it an effective sale-deed. This clause imposes a duty on the seller to execute proper conveyance but the buyer must also tender (make offer of) the consideration amount due to the seller. Normally, the payment of price by the buyer and execution of conveyance by the seller are reciprocal duties of buyer and seller. Therefore, the transfer of ownership by execution of deed and the payment of price is to take place simultaneously. The place for execution of conveyance and payment of price is the seller's residence or his solicitor's office. Section 55 (1) (d) provides that execution and payment of

42. *Biswandas v. Huzi Fazal*, (1937) Pesh. 8.

43. *Krishnam v. Sudhir Chandra*, AIR, 1965 Cal. 66.

price is to be made 'at a proper time and place'. But such a proper time and place has not been specified. As stated above the proper place for execution of the deed is seller's residence or his solicitor's office rather than the Registration Office. The time when the execution and payment of price is to take place has also not been specified in this section. But, the seller must execute the conveyance within a reasonable time. However, the place and time both may be stipulated otherwise by the parties. In case there is no stipulation fixing the time of execution and, the seller makes unreasonable delay in so doing, the proper course is to give notice making time of the essence of the deed is presented for registration. The seller then, admits before the Registering Officer that he has executed the deed and also that he received the amount due to him. This completes the execution of the conveyance or transfer of ownership from seller to buyer.

(v) *Care of property and title-deeds* : S. 55 (1) (e).—After execution of the conveyance, the next duty of the seller is to take care of the property and the documents of title. They are to be handed over to the buyer after the sale. In between the date of contract of sale and the delivery of property, although the seller continues to be its owner yet, he has to keep the property intact so that it can be delivered to the buyer after the sale. So in between the date of contract of sale and transfer of possession, it is the duty of the seller to preserve the property and the title-deeds. The extent of care as specified in this clause is the care which an owner of ordinary prudence would take of his own property. In this regard, the position of the seller is that of a trustee and he has to hold the property and the title-deeds as a trustee holds the trust property under the Indian Trusts Act.

This duty continues upto the time when possession of property and title-deeds are given to the buyer. If the seller neglects this obligation, the buyer is entitled to compensation. Such compensation may be deducted from the price and if the conveyance has been completed, he is entitled to recover damages.

(vi) *Payment of outgoings* : S. 55 (1) (g).—Before completion of sale, the seller continues to be owner of the property. Therefore, the government dues etc. are to be paid by him. Seller's last duty before completion of sale is to pay all the outgoings. Outgoings of a property are Government dues or public charges such as revenue, taxes or, rents etc. due on the property. In other words, before completion of the sale, all the public charges or taxes due on the property must be paid by the seller himself. Moreover, unless there is a contract to the contrary, the seller must also discharge all the incumbrances, if any. Thus, he should convey the property to buyer free from all liabilities on the property. Where the seller does not pay the outgoings or does not discharge the incumbrances, and subsequently buyer has to pay it then, buyer is entitled to be reimbursed by the seller under Section 69 of the Indian Contract Act.⁴⁶ The buyer has a right to require the seller to produce evidence that property is free from

44. *Imperial v. Bapji*, AIR 1934 Bom. 1; 149 IC 317.
45. *Narita Khan v. Sarwan*, AIR 1922 P.C. 176.

S. 55] all incumbrances. For instance, where the vendor produces release of the mortgage, he must show that the release was signed by the mortgagee or any person authorised by such mortgagee.⁴⁶

Seller's Duties (Liabilities) after Sale.—Seller's duties after the completion of the sale are given below :

- (i) To give possession to the buyer.
- (ii) To covenant for title.
- (iii) To deliver title-deeds on receipt of the price.

(i) *Giving possession of property* : S. 55 (1) (f).—On being required by the buyer the seller has a duty to give possession of the property to buyer or to such person as he (buyer) directs. There is an implied contract to give the possession of the property to buyer. The seller has to do it ; he (seller) shall not leave the buyer to get the possession himself. As regards the mode of giving possession, it may be stated that delivery of possession depends upon the nature of property. In the case of tangible immovable property, it is physical control. In case of intangible immovable property, the possession is symbolic. Where the land was in possession of the tenants and this fact was known to vendee, it was held that vendor was not bound to deliver vacant possession and the vendee was entitled to only symbolic possession.⁴⁷

This clause is silent about the time as to when the possession is to be given. But in view of Section 55 (4) (a) the possession is to be given when ownership is transferred to the buyer. In the absence of any contract to the contrary, this would mean the date of execution of the sale-deed.

(ii) *Covenant for title* : S. 55(2).—Sale is a transfer of ownership or absolute interest. When a person contracts to sell his property, it is implied that he must be owner of that property otherwise he would not have attempted to sell it. Section 55(2) of the Act lays down that in every sale the seller impliedly undertakes a guarantee that the interest which he is transferring subsists and he has authority to transfer the same. Technically, this is known as 'implied covenant for title'. Any express covenant or declaration that seller has title and authority to transfer the property is not necessary. In other words, in every conveyance the seller is deemed to have contracted with the buyer that the interest being transferred by him is owned by him and he has power to transfer it. In a sale the seller undertakes impliedly that he is transferring 'title free from reasonable doubt'. The object of making statutory duty of vendors is to prevent them from practising fraud upon negligent purchasers by selling properties which they have no right to sell or selling interests larger than they possess.

Under Section 55(1), the buyer is given opportunity to inquire about the title and authority of the seller by imposing a duty upon the seller to produce deeds

46. *Hirabai v. Jangopal*, AIR. 1925 Bom. 69.

47. *Raj Kumar v. Shanti Sunroop Gandhi*, AIR. 1932 P & H 18 ; *Abdul Hamid v. Shahjahan Begum*, AIR 2008 NOC 640 (NEF), suit for specific performance was decreed but direction for delivery of possession was not mentioned in the decree. It was held that the Court exercising the could be amended for this purpose under Section 152, CPC.

of title on his demand. But, since the duty imposed upon the vendor to pass on to the vendee a perfect title under the sale is statutory duty, the vendee is entitled to claim damages even if it is proved that he was negligent in demanding and inspecting the title-deeds. The duty of the vendor to pass on the same title or interest which the vendor possesses is so much implied in every conveyance that even if the vendee has accepted the conveyance having notice of the defective title, he cannot be deprived of his right to claim damages and refund of consideration in case the covenant for title is broken. However, the seller's liability to assure perfect title to vendee is limited to only that title or interest which he had agreed to transfer. If he himself has contracted to sell occupancy rights, he cannot be held liable if the buyer is subsequently dispossessed of the property by a person having a title-paramount.⁴⁸

The second paragraph of Section 55 (2) deals with cases where the seller effects the transfer in some fiduciary capacity e.g. where the seller is guardian of minor's property or where he is a trustee of the property sold. This clause provides that in such cases, the seller is deemed to have only covenanted that 'he has done no act whereby the property is encumbered or whereby he is hindered from transferring it'. The implied covenant for title does not apply as such in the cases where vendor is selling property as guardian of minor's property or as trustee. It may be noted that a trustee has the power to transfer the trust-property but he has to declare that he is selling trust-property which is not his own. Therefore, where a trustee sells such property without disclosing that the property is trust-property, it may amount breach of covenant for title.

The third paragraph of Section 55 (2) provides that implied covenant for title shall be annexed to the property; it shall run with the land. This means to suggest that the benefit of this clause is available not only to the buyer but to every subsequent transferee and may be enforced by anyone in whom that interest is vested for the whole or any part thereof. In other words, seller's duty to covenant impliedly for title does not end with the buyer.

However, since the rights and liabilities under Section 55 are in the absence of any contract to the contrary, the parties may agree in express terms and enter into a contract in any manner contrary to this provision. But such contract must expressly and clearly show that buyer is not bound by implied covenant for title as contemplated under this clause.

(iii) **Delivery of title-deeds : S. 55 (3).**—After completion of the sale when buyer becomes owner of the property, he must also get the title-deeds which are the legal documents relating to property sold. These documents are now of no use to seller. Accordingly, the seller has to deliver the title-deeds of the property to purchaser after completion of the sale. After sale, the title-deeds are to pass on to the buyer as a natural consequence of the transfer of ownership. The seller is liable to hand over not only those documents which are in his possession but also those which are important and within his power. Where such documents or their certified copies are to be obtained from Government-offices, the seller is liable to bear the expenses in obtaining them.

48. *Kulila Mal v. Umra*, (1921) 61 I.C. 604.

Although as a general rule the title-deeds must be delivered to the buyer after completion of the sale yet, the seller may retain them with him till payment of the whole price. But, after payment of the full price, the seller is liable to deliver all the relevant title-deeds to buyer.

However, the *proviso* to Section 55 (3) provides that :

- (a) Where the seller retains that part of property with him which is of greatest value and, such property is included in the documents, the seller is entitled to retain all the documents with him.
- (b) Where the whole of such property is sold to several buyers the person who purchases largest part of property would be entitled to retain all the documents.

Seller's Rights before Sale : S. 55 (4) (a).—Before completion of sale, the seller is entitled to all the rents, profits or other beneficial interests of the property. It may be mentioned that sale is completed only upon the transfer of ownership. Until ownership is transferred, the seller continues to be owner and as such he has every right to enjoy the profits of the property. Before passing of the title, there is only a 'contract of sale'. As discussed earlier, the contract of sale does not create any proprietary interest in favour of the buyer. So, it is the seller's right to get rents, profits or produce of the sale-property.

Where the buyer takes possession of the property before completion of sale, the seller has right to realise interest on unpaid purchase money. This is because of the fact that before transfer of ownership, the buyer though not legally entitled to get any profit out of property, is presumed to have been getting the benefit while in possession. So, equity requires that such buyer must pay interest of unpaid purchase money. The buyer would not be allowed to have both the benefits namely, taking the rents and profits of the property as well as keeping the price unpaid.

Seller's Right after Sale : Seller's Lien or Charge : S. 55 (4) (b).—After completion of sale, if the price or any part of it remains unpaid, the seller acquires a lien or charge on the property. When the sale is completed, the ownership is transferred from seller to buyer. In such a situation if price remains unpaid, the seller can neither refuse delivery of possession nor can claim back the possession if already given to buyer. The completion of sale of an immovable property does not depend on the payment of price; the price or a part of it may also be paid after the sale. Therefore, under Section 55 (4)(b) the seller is given a right to recover the unpaid purchase money from out of the property. This is called as a statutory charge of the seller for unpaid price. In other words, he has a lien on the property or a charge is created in his favour. This is the only remedy left with the seller for recovery of the balance purchase money.

In a charge, there is creation of a right of payment out of the property specified. Charge may be created either by act of parties or by operation of law. Under this section the charge is statutory charge i.e. by operation of law and the property specified for securing the payment (of unpaid price) is the sale-

property. Since under this right a seller is not entitled to retain the possession, the charge is said to be a non-possession lien.⁴⁹ Where the seller has given possession of the property to buyer, he cannot claim return of the possession on the ground of non-payment of whole or part of the consideration amount. Thus, after completion of sale, the seller is neither entitled to refuse delivery of possession nor to claim it back. This section gives him a right only to get unpaid price from out of the property sold to buyer. This he does by enforcing the charge.

For the recovery of unpaid purchase money the seller can enforce his charge under Section 100 of this Act by a suit against the buyer for sale of the property. But such a charge cannot be enforced against any subsequent transferee for value without notice of the charge in favour of the vendor. In the absence of an acknowledgment, statutory charge under Section 55 (4) (b) cannot be claimed after the expiry of twelve years.⁵⁰ Where the property has been sold to several purchasers, the seller has a charge on the whole property for unpaid price without having any regard as to the proportion of money to be paid by each purchaser.⁵¹

Interest on Unpaid Price.—Seller's unpaid price is like a debt. Therefore he is entitled to claim not only the unpaid part of the purchase-money but also interest on such amount.⁵² If the buyer is already in possession of the property, the seller is entitled to claim interest only from the date on which such possession was delivered, not from the date of transfer of ownership. However, where the parties have agreed for the payment of price on any future date the seller would be entitled to claim interest not before that date even if possession was given earlier.

Transfer of Sellers Charge.—A charge created in favour of the vendor is an unsecured money debt. Therefore, it is an actionable claim. Like other kinds of actionable claims, a charge is also transferable. Where, a vendor having charge on the property for his unpaid price, he can transfer it to a third person. If so transferred, the assignee (transferee) is entitled to enforce the charge just as the vendor would have enforced it himself. But, the assignment (transfer) of such charge must be made through a registered instrument.

Exclusion of the Charge.—The statutory charge created in favour of seller may be waived or excluded by (a) any express contract to the contrary or, (b) by an implied contract i.e. some conduct inconsistent with continuance of the charge. For exclusion of charge, it is necessary that the parties have contracted in express terms that in case the price or any part of it remains unpaid, the seller shall not have any charge on the property. Where the parties have agreed that payment is to be made in instalments or that the payment of a part of price would be delayed, it cannot be said that the charge was excluded. In *Webb v. Macpherson*⁵³ the Privy Council observed thus :

"...there is no ground whatever for saying that the charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments nor is it in their Lordship's opinion, excluded by any contract, covenant or agreement with respect to purchase money which is not inconsistent with continuance of the charge."

In India the charge is statutory charge. It is created by enacted law and it can be waived or excluded only in a manner indicated by law. The law provides that such charge can be excluded only by a contract to contrary which may either be express or implied. Creation of charge is implied if it could be inferred from the conduct of the parties. Accordingly, the charge is not excluded if the seller simply directs that buyer should pay the price or a part of it to his (seller's) creditor or, to any other person on his behalf. The charge is also not lost if the seller takes security by way of a promissory note or a bond or a mortgage for the unpaid price.⁵⁴

Existence of a contract inconsistent with continuance of charge may be inferred also from the conduct of parties or the circumstances. Where the direction by seller to pay the amount to a third party is the result of any *new contract* extinguishing seller's liability towards that third party, there is implied waiver by the seller. In such circumstance, the seller's charge is lost. For example, A sells certain properties to B for Rs. 10,000 of which Rs. 5000 remains unpaid. A (seller) had taken a loan of Rs. 5000 from C so A has to pay Rs. 5000 to C. Now, C agrees to release A from liability of the loan and to recover this amount from B (buyer). B agrees to pay Rs. 5000 to C. Here A has waived his statutory right of charge on the property. This is an instance of exclusion of charge by a (implied) contract to contrary and A's right to charge is, therefore, lost. Similarly, where a seller directs the buyer to pay the unpaid part of price to his illegitimate son on attaining majority it was held that vendor was not entitled to any charge on the property.⁵⁵

Seller's Lien in Punjab.—In Punjab where this Act is not enforced, the provisions of Section 55 (4) (b) have been applied by Courts on the ground of equity, justice and good conscience.

English Law.—Under English Law, the seller acquires lien on property under the principles of equity. When the contract of sale is constituted, the seller gives to the buyer an equitable estate even before completion of sale. But, in return, he also acquires lien on the property from the date of contract. The equitable lien continues after completion of sale provided price remains unpaid. In India, since contract of sale does not give any interest in property to buyer, the seller too does not acquire any charge on property. In India, the charge is created only after the conveyance. In India, the seller's charge is creation of law not of equity.

49. *Krishnamma v. Mani*, (1920) Mad. 712; 56 I.C. 530.

50. *Lakshminarayana v. Land Acquisition Officer*, A.I.R. 1985 A.P. 200.

51. *Bhag Mal v. Shri Ram Gurram*, A.I.R. 1934 Lah. 348.

52. *Ninia Kaur v. Basant Singh*, A.I.R. 1934 All. 406.

53. (1908) 31 Cal. 57; 30 I.A. 238, cited in *Mulla, TRANSFER OF PROPERTY ACT*, Ed. VII, p. 327.

54. Where the seller promises to give some money by a promissory note to the buyer not as security for payment of price but as price itself, the seller is deemed to have been fully paid and he has no charge on the property.

55. *Chandra Keshava v. Perumal Chettiar*, A.I.R. 1939 Mad. 772.

However, in effect there is no distinction between English equitable lien and Indian statutory charge because both entitle the seller to recover unpaid price by sale of property.

BUYER'S DUTIES AND RIGHTS

Buyer's Duties before Sale.—Before completion of sale, the duties (liabilities) of the buyer are as under :

- (i) To disclose facts which materially increases the value of property.
- (ii) To pay the price.

(i) *Duty of disclosure : S. 55 (5) (a).*—Before completion of sale, the buyer is liable to disclose to the seller the facts which materially increases the value of property. This liability is limited to disclosure of only those facts which relate to title or interest of the buyer. In some cases i.e. where the seller is an aged lady or an illiterate person, it may happen that seller is ignorant about his own rights in property. Taking benefit of this lack of knowledge the buyer may persuade the seller to sell the property at much lesser cost. Therefore, Section 55 (5) (a) provides that if there is any fact known to the buyer regarding seller's rights in his property which if known to buyer, he would have sold the property at higher cost. In such cases, the buyer has a duty to disclose that fact to seller. Concealment of this fact by buyer may be regarded as fraud and if it is proved, the seller may avoid the contract of sale. In *Summers v. Griffiths*,⁵⁶ an old lady believing that her rights in the property were not absolute, contracted to sell it at much less price. But, the buyer knew that her title was perfect. Despite his knowledge about absolute interest of that lady, the buyer did not disclose it to her. The buyer was held liable for the fraud and on this ground the sale was set aside.

Under Section 55 (1) (a) the seller has a duty to disclose to buyer latent material defect which includes disclosure of also defect in his title if any. His non-disclosure amounts to fraud. Similarly under this section the buyer too has been made liable to disclose to the seller his better rights or interest which is unknown to him (seller) but buyer has the knowledge. So, when seller is expected to have good faith, the buyer too is expected similar good faith in all that he says or does in respect of contract of sale.

Under this section a buyer has no duty to disclose the fact which materially increases the value of property. For instance, A contracts to sell his piece of land to B for Rs. 10,000 not knowing that there is a gold mine beneath the land. But, somehow, B has the knowledge that there is a gold mine. This fact is such which if known to A he would never have sold the land for Rs. 10,000, because gold mine materially increases the market-value of land. But under this section B has no duty to disclose this fact and if A later on gets information of this fact he (A) cannot rescind the contract on the ground of B's fraud. Here, B has not committed any fraud.

56. (1866) 35 Beav. 27; cited in Shah's PRINCIPLES OF THE LAW OF TRANSFER, Ed. III, p. 131.

Since buyer and seller both enter into a contract of sale of an immovable property with utmost caution, at least with regard to title or interest in the property, there have been no cases in India under this sub-section.

(ii) *Payment of price : S. 55 (5) (b).*—Normally, the execution of sale-deed and payment of price take place simultaneously. Therefore, for the completion of sale in favour of buyer, the seller has the duty of execution of deed and buyer has corresponding duty of payment of price. But, the buyer is not bound to pay the full amount before transfer of ownership. All that is required is that before execution, he either pays the price or promises to pay it at a time and place of completion of sale. His duty under this sub-section is, therefore, personal. Thus, the duty of the buyer is to tender (make offer for) a conveyance for execution of the deed; he is not bound to pay the price until the conveyance is executed.

Where the property is incumbered (burdened with some liability) but has been sold free from incumbrances without being discharged by the vendor, the buyer is entitled to discharge the incumbrances out of the purchase money. If the buyer discharges the incumbrances and in so doing has to pay an amount which is more than the price settled, the buyer is entitled to recover the difference by a separate suit against the seller.

Buyer's Duties after Sale.—After completion of sale, the buyer has following two liabilities :

- (i) To bear the loss to property, if any.
- (ii) To pay the outgoings.

(i) *To bear the loss to property : S. 55(5) (c).*—After completion of sale, the ownership is transferred from seller to buyer. That is to say, after sale, the buyer becomes owner of property sold to him. As such, if there is any loss to property subsequent to sale, it is the buyer who shall suffer that loss as owner of property. He cannot hold the seller (who was owner before completion of sale) to bear the loss unless it is proved that loss was caused by seller himself. Accordingly, if after completion of sale, the value of property is reduced because of its deterioration or destruction, the buyer is bound to suffer the loss. Law does not permit him to recover the loss incurred by him from the seller. However, where the seller had insured the property against fire and after completion of sale the property is destroyed or damaged by fire the buyer may require the seller to apply the insurance money for restoring or repairing the property.⁵⁷

(ii) *To pay outgoings : S. 55 (5) (d).*—After completion of sale, since buyer becomes owner of the property, he is liable to pay the outgoings e.g. Government dues, rents, revenue or taxes. Before sale, the liability to pay these public charges is on the seller. After sale, together with ownership this liability is also transferred to buyer. It may be noted that this liability is in between the seller and the buyer. The authorities recovering the public charges or taxes do not come into picture. The authorities have to recover these charges

57. See Section 49 of the Transfer of Property Act, 1882.

from the owner of property whosever might be that person on the date from which it becomes due. Accordingly, before transfer of ownership it is the liability of seller and after it, this liability becomes that of the buyer. If for some reason, the charge is levied upon the seller after the transfer of ownership, he has a right of indemnity against the buyer. Further, since the liability to pay the outgoings is statutory liability, not contractual, therefore, it is binding also on a minor vendor on whose behalf the property has been sold.⁵⁸

Buyer's Rights.—The buyer has only two rights; one before completion of sale and the other after the sale. Before completion of sale, the buyer has a lien (charge) on the property for any sum of money paid by him as price if sale could not be completed. After completion of sale, he is entitled to get all the benefits etc. of the property incidental to ownership.

Buyer's Rights before Sale : Buyer's charge : S. 55 (6) (b).—Before completion of sale, buyer has a charge on the property for any sum of money which he had paid towards price or as an advance. Where the sale does not take effect due to default of the seller or where the seller refuses to execute the conveyance, the buyer has a right to recover all the sums paid together with interest. Interest is payable from the date of payment of price to seller till the date of delivery of property to purchaser or till the execution of sale deed, whichever is earlier. It is also to be noted that purchaser's charge under Section 55(6)(b) is a statutory charge and differs from a contractual charge which buyer may be entitled to claim under separate contract. In *Delli Den. Authority v. Skipper Construction Co. (P) Ltd.*,⁵⁹ the Supreme Court, held that if the immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject matter of agreement is converted. Buyer's right of charge for any sum of money pre-paid under this sub-section is like seller's charge for unpaid price.

After the contract of sale is constituted, the seller has to execute conveyance whereby ownership is transferred. At this stage, the buyer may pay a sum of money either as an advance or as part of the price. Now, if for some reason, the seller fails to pass on the title to buyer or refuses to execute the sale deed, the buyer is entitled to recover his money. The right to have a charge for the price paid in anticipation of sale, is available to buyer only where the default rests with the seller. If the transfer could not take place due to buyer's own default or he himself refuses to take the property, he cannot claim any charge. The buyer's charge exists even if possession is already with him but ownership could not be transferred due to seller's fault.

The charge under this sub-section is enforceable not only against the seller but also against all persons claiming under him. Thus, the buyer can enforce the

58. *Gangi v. Ganidin*, A.I.R. 1924 Mad. 544.

59. AIR 2000 SC 573 : *Milind Joseph v. Chidambaram Virudhadevi*, AIR 2009 Ker 2, buyer's charge on property under sale agreement, enforceable not only against seller but also against all persons claiming under him. Period of limitation for enforcing the charge is 12 years from the date on which it becomes due and not three years. It is also linked with the fact whether the buyer has improperly declined to accept property.

charge against a person in whose favour the sale was subsequently executed. Enforcement of this statutory charge is not subject to doctrine of notice. Plea of want of notice on the part of such third person would not be accepted by Court.

The buyer's charge for price paid in anticipation of sale exists even when the property (subject matter) has been compulsorily purchased by a competent authority. In *Asger S. Patel v. Union of India*,⁶⁰ the amount of purchase money was properly paid by the buyer in anticipation of fulfilment of the contract of sale. But, subsequently an order of compulsory purchase of the property was passed under Section 269 (UD) of the Income-tax Act, 1961 whereby the buyer was excluded from accepting the delivery of property. The Supreme Court held that in such cases too the provisions of Section 55(6)(b) of the Transfer of Property Act are attracted and the buyer has a charge on property for the price pre-paid by him.

However, where the performance of contract of sale is dependent on vendor's getting possession from his tenant who is protected under the Tenancy Law, the statutory charge cannot be created in favour of vendee until the vendor himself gets the possession.⁶¹

The buyer's charge comes into force the moment he pays the purchase money or any part of it. A subsequent compromise entered into between the seller and the buyer and that too at a time when the seller has lost his title was held not affecting the buyer's charge under Section 55 (6) (b).⁶²

Buyer's Rights after Sale : S. 55(6) (a).—After completion of sale, the buyer becomes owner of the property. Therefore he is entitled to get all the benefits arising out of that property with effect from the date of transfer of ownership. Thus, the buyer is entitled to get the rents, profits or produce or any other beneficial interest which are legal incidents of that property.

An agreement of sale does not by itself create any interest or charge over the property in dispute in favour of the vendee. The statutory charge is confined to refund of the earnest money or sale consideration where proceedings are instituted against the vendor on the footing of the agreement. Such statutory charge does not enable the vendor under the agreement to sue a third party (municipality in this case) to recover the value of the property. A suit for compensation against the municipality was held to be not maintainable.⁶³

Effect of seller's title failing.—The allotment of land by a Trust to the trustee was transferred by the allottee with the approval of the trustee. It was held that the transferee could not get any independent right over and above with that of the transferor. The allotment was subsequently cancelled because the allottee was found to be not eligible. The transferee could not claim to

60. AIR 2000 SC 222.

61. *Ganpati Ram v. Bahram Begum*, A.I.R. 1974 Bom. 155.

62. *Mohi Ajithkumar v. Vimala Sathidharan*, A.I.R. 2012 Ker 87.
63. *Gopibinder Arjun v. Siddagat Municipality*, AIR 2008 NOC 1169 (AP). *Basant Kaur v. General Public*, AIR 2008 NOC 1406 (P & H) (DB), mere agreement for sale does not create any charge legal representative of succession in interest of the deceased testator.

continue with the allotment. But because of the facts of the case and transferee's willingness to pay the additional amount, the Trust was directed to reconsider his case.⁶⁴

56. Marshalling by subsequent purchaser.—If the owner of two or more properties mortgages them to one person and then sell one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

SYNOPSIS

- Marshalling by Purchaser.
- Illustration.

Marshalling by Purchaser

This section incorporates the rule of marshalling by a purchaser. Marshalling means arranging something. Here, it has been used in the sense of purchaser's right to make arrangements with regard to sale of mortgaged properties in such manner that mortgage debt is satisfied out of the property not sold to him.⁶⁵ The rule of law enacted in this section is that, if the owner of two or more properties mortgages them to one person and later on sells any one of such properties then, the buyer is entitled to claim that mortgage debt be satisfied first from the properties not sold to him. In other words, in such situations, the buyer has a right to say that as far as possible the liabilities should be discharged from other properties and thereafter, if needed, property sold to him should be touched.

Illustration

A, who is owner of properties X, Y and Z mortgages these properties to M. and takes a loan of Rs. 20,000. A then sells property X to B. Here, X is one of the properties which has jointly been mortgaged to M. Under this section, if M enforces the mortgage for recovery of Rs. 20,000, B has a right to insist that the mortgage debt be first realised out of properties Y and Z. So, Rs. 20,000 are to be realised from Y and Z alone. But, if Y and Z could be sold say, only for Rs. 18,000, then the remaining Rs. 2000 may be recovered from property X sold to B. However, as this section itself provides, if between A and B i.e. between seller and buyer, there is any contract contrary to this rule, B may agree any other arrangement subject to which he consented to take property.

Marshalling under this section applies only between buyer and seller and not as between other subsequent purchasers. The rule of marshalling is based on

⁶⁴. *Bejits Singh v. Improvement Trust, Ludhiana*, AIR 2009 SC 1251.

⁶⁵. Rule of marshalling by subsequent mortgagee in the cases of mortgage has been dealt with under Section 81 of this Act.

principles of equity and justice and justice demands that where a person purchases some property free from incumbrances, his absolute interest should not be prejudiced. Therefore, the rule under this section exists for the benefit of the buyer, not for the owner (seller) himself.⁶⁶ So long as the property continues to be the property of the owner and is subject to mortgage, the option of the mortgagee to proceed against any or all the items exists.⁶⁷ But, as soon as another property is sold, the purchaser, cannot exercise marshalling against other subsequent purchaser.

Marshalling by purchaser is exercisable only in between the buyer and the seller. It is not permitted to be exercised detrimental against the rights of mortgagees or other person claiming under him or, any person having an interest in any of the properties. However, whether the marshalling by purchaser causes prejudice (loss) to the mortgagees or not, is a question of fact which has to be pleaded by the person who says that he has been prejudiced.⁶⁸

The right of marshalling under this section is available to a purchaser whether he has notice of the mortgage or not.

DISCHARGE OF INCUMBRANCES ON SALE

57. Provision by Court for incumbrances, and sale freed therefrom.—(a) Where immovable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court—

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Central Government, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and
- (2) in any other case of a capital sum charged on the property of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other

⁶⁶. *J. P. Builders v. A. Ramnath Rao*, (2011) 1 SCC 429, the view of some of the High Courts was that the equitable doctrine of marshalling is meant for the benefit of buyers only was implicitly approved in this case. The Supreme Court also observed that the plea of marshalling is a pure question of law and therefore it can be raised for the first time in appeal without having been specifically pleaded before the Trial Court.

⁶⁷. *Sunil Dishi Meht v. Birlaqi Ram*, (1947) Lah. 230, 226 I.C. 366.

⁶⁸. *Brahma Prakash v. Manbir Singh*, AIR 1963 S.C. 1607.

contingency, except depreciation of investment, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrances, unless the Court, for reasons to be recorded in writing thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section 'Court' means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the State Government may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

The concluding section of this chapter deals with procedure for the discharge of incumbrances on a property which has been sold free from incumbrances. Incumbrances means liabilities on the property sold. Such incumbrances may be in the form of mortgages, lien or charge or trust for securing money. Section 57 empowers the Courts for discharge of incumbrances by issuing order for depositing the amount due so as to make payments. Such an order is passed by the Court either on an application by any party to the sale or in execution of a decree. But this section does not apply where a mortgagee's decree for sale has been adjusted out of Court.

However, the Court's power under this section is discretionary. The Court may not make orders in cases of hardship *e.g.* where the capitalized value of the liabilities is considerably in excess of the properties and the seller prefers to exercise his right of rescission.⁶⁹

69. *In re Great Northern Ry Co. and Sunderson* (1884) 25 Ch. D. 788. Cited in *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XII, p. 437.

IV

OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES

58. (a) "Mortgage", "mortgagor", "mortgagee", "mortgage-money", and "mortgage-deed" Defined.—A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee, a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.—Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller;

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) **Usufructuary mortgage.**—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest, or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) **English mortgage.**—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) **Mortgage by deposit of title-deeds.**—Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent, documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) **Anomalous mortgage.**—A mortgage which is not a simple mortgage, mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds, within the meaning of this section is called an anomalous mortgage.

SYNOPSIS

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MORTGAGES

Meaning of Mortgage.—Loans may be secured or unsecured. Where money is given simply on the basis of debtor's promise to pay i.e. on promissory-note, the creditor (who gives the money) can file suit for recovery of his money. But, if such debtor has no money to repay the loan or becomes insolvent, the creditor's money is lost because he cannot recover it from debtor's property. Such loans are, therefore, called unsecured loans. On the other hand, before giving the loan, the creditor may take security from the debtor for the repayment of his money. Where the loan is secured against any movable property, it is called

a pledge. Where the loan is secured against some immovable property of the debtor, it is called mortgage. In both the cases, whether the property is movable or immovable, the loan is secured because in default of repayment, the creditor can recover his money from the property which has been specified as security.

Where a person takes loan and specifies certain immovable property as security, it is said that he has taken loan by mortgaging his property. The transaction of mortgage has been a very common method of taking loan and was known to the oldest systems of law. In Roman law, mortgage was known as *fiducia* under which the property secured used to belong to creditor in case of non-payment of loan. Similar provisions were available in ancient Hindu law and Muslim law. At common law, in England the mortgage created a legal estate in favour of the creditor. If the money was not repaid within the stipulated period, the land belonged absolutely to the creditor and debtor lost his rights in the property for ever. Such situation was regarded as unjust by equity. Some modifications were, therefore, made by equity. It was provided by the courts of equity that where a person takes loan only in great need of money and for which he has to put his land in security, his intention is not to transfer the land in consideration of the money taken on loan. It is a borrowing transaction rather than transaction of sale. So, his interest must be protected in case of non-payment on due date. Equity thus provided that, once a mortgage, always a mortgage; it should not become sale on non-payment of loan on the due date. In other words, the strict common law rule of transfer of legal estate in favour of creditor in default of repayment of loan was modified by equity to do justice with the debtor. Accordingly, mortgage was regarded as essentially a transaction for taking loan not a transaction for the transfer of title of property. Further, any condition which used to take away the mortgagor's (debtor's) right in his property was void as being penalty for him. Law of mortgages has developed in India on similar lines.

Definition of Mortgage.—Section 58(a) defines mortgage in the following words:

"Mortgage is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability".

Mortgage as defined in this section is transfer of an interest in some immovable property. It is not transfer of all the interests but only of some interest in the property. The purpose of this transfer of interest is to give security for repayment of loan. Therefore, where a person mortgages his property, the legal effect is that there is a transfer of an interest of that property in consideration of money advanced to him by the money-lender. In case the loan could not be repaid, the money-lender can recover his money on the basis of that interest¹. The loan may either be present or might have been taken in the past. It may also be in the form of any pecuniary liability of the mortgagor towards mortgagee.

The person who takes loan under a mortgage i.e. transfers the interest in his immovable property, is called *mortgagor*. The person in whose favour, the property is mortgaged i.e. who advances loan, is called *mortgagee*. The sum of money taken as loan under mortgage is called *mortgage-money* and the instrument or deed of transfer is called *mortgage-deed*.

Essential Elements of Mortgage.—Following essential elements are necessary in mortgage:

1. There must be transfer of an interest.
2. The interest transferred must be of some specific immovable property.
3. The purpose of transfer of interest must be to secure payment of any debt or, performance of an engagement which may give rise to a pecuniary liability.

(1) Transfer of Interest.—In a mortgage there is transfer of only an interest of the immovable property. There is no transfer of absolute interest or ownership. The interest is transferred in favour of the mortgagee who advances the money as loan. It is the interest of property which gives him (mortgagee) the right to recover his money from mortgagor's property. A peculiar feature of the interest transferred is that such interest itself is an immovable property. However, mortgage is not a transfer of all the interests. After transferring this interest in favour of mortgage, there still remains a vested remainder with the mortgagor.¹

What type of interest of the property is transferred as security in the mortgage? This may differ from case to case and decides the kind of mortgage. The classification of mortgage is based on the nature of interest which is transferred to secure the loan. For example, in a simple mortgage, the interest transferred is the *right of the mortgagee to sell the property*. In a usufructuary mortgage, there is transfer of the interest (*right of possession and enjoyment of usufruct* (produce) of the property. In a conditional mortgage, there is transfer of *right of ownership subject to the condition* (of non-payment). Thus, in every kind of mortgage there is transfer of some kind of interest of the property. But there is never a transfer of whole interest in the mortgage property.

An agreement to mortgage does not create any interest in favour of the mortgagee. In fact it does not constitute any mortgage at all. Such agreement creates only a personal obligation to repay the loan: there is no transfer of any interest in any property. Therefore, an agreement to mortgage is neither a mortgage nor a charge. However, in England an agreement to mortgage may be regarded as an equitable mortgage which may be enforced against mortgagors (borrowers) property. But in India, such agreement is merely a personal agreement and only remedy available in this case is claim of damages for breach of contract. An agreement under which a debtor promises not to transfer any of his property till the loan is fully paid, is not a mortgage. It can be

1. *Ali Hussain v. Nila Kandam*, (1864) 1. Mad. H.C. 356.

enforced only as a contract not as mortgage. Thus, an agreement to mortgage is only a personal obligation of the debtor and like a contract creates a right *in personam* in favour of the creditor. On the other hand, a mortgage creates a right *in rem* in favour of creditor (mortgagee). He can enforce it also against subsequent mortgagees irrespective of notice of any prior mortgage.

The first essential condition in a mortgage is that there must be a transfer of some interest in the property of mortgagor. Transfer of interest means transfer of property. Therefore, mortgage is a transfer of property within the meaning of Section 5 of this Act. Accordingly, all the essential conditions for a valid transfer must be fulfilled also in mortgage, e.g. it must be between two living competent persons etc. However, it is not necessary that the deed of mortgage expressly mentions such transfer; it is sufficient if the deed means to suggest that there is transfer of interest, (property) by way of mortgage.

(2) *Specific immovable property.*—The property which is being mortgaged must be specific immovable property. The immovable property must be specifically mentioned in the deed. That it is to say, it must be mentioned in a reasonably certain manner so that it can be identified as to which property has been mortgaged. The property must not be described in general terms, such as, "my all properties" or, "my house and landed properties". On the other hand, where the property has been described in a manner that it can be ascertained without any doubt, the property is specific even though no particular details are given in the deed. For example, where the mortgagor has only one house in a city, say at Ghazalabad, "my house in Ghazalabad" is specific mention of the property although no house number etc. is given in the deed. Similarly, "our Zamindari property" or, "all properties of the entire Bhag" have been held specific mention of the mortgage-property.

Immovable property includes also things attached to what is embedded to the earth. For instance, a machinery attached permanently in a house for beneficial enjoyment of that house (say, water-pump) is also an immovable property. Therefore, mortgage of the house shall include also the mortgage of that machinery or any other fixture which is part of that immovable property. But, if the machinery or other fixture is not attached for permanent beneficial enjoyment, it shall not form part of security if the house is mortgaged.²

(3) *The purpose of mortgage : Consideration of mortgage.*—The last essential element of mortgage is its purpose. The purpose of mortgage must be to secure a debt. Mortgage is a transfer of property supported with some consideration; the consideration of mortgage is to secure a debt. Mortgagor transfers the interest in his property to mortgage in consideration of security for payment of some kind of loan taken by him. The loan may be in the form of:

- (1) Money advanced or to be advanced,
- (2) An existing or future debt, or

2. *Narayana v. Bolegurusami*, A.I.R. 1924 Mad. 187.

- (3) The performance of any engagement giving rise to a pecuniary liability.

Mortgage may be executed for a sum of money advanced or to be advanced on a future date. Where the mortgagee has already given some money, the mortgagor may execute a deed of mortgage as security for its payment. This is a mortgage for the money advanced. The mortgagor may also execute the deed of mortgage before he gets full amount from the mortgagee. The Supreme Court has held that a transaction of mortgage does not become ineffective merely because the mortgage could not advance the money on the date of execution of the deed.³ It may also happen that some of the money is advanced on the due date and the remaining is given on any future date. It is immaterial as to when the money is given after execution of the mortgage deed. In *Raghunath v. Amir Bakhsh*,⁴ A executed a mortgage in favour of B on 3rd May. B gave the money to A on 10th May. But, in the meantime, on 7th May, A sold the mortgage-property to C. Thus C purchased the property subject to mortgage. But C argued that since the consideration (money advanced as loan) was not paid before the sale, there was no mortgage at the time of sale, therefore, he was not bound by the mortgage. It was held by the Patna High Court that the mortgage was effective from the date of its execution which was 3rd May i.e. before the sale. Therefore, C was bound by the mortgage.

'Existing debt' means a debt the claim of which exists at present e.g. a debt which is not barred by limitation. Such debt may be secured by way of mortgage. Mortgage may be effected to secure also a 'future debt'. Future debt is a sum of money which the mortgagee is entitled to get from mortgagor on a future date. A future debt may also be a contingent-liability i.e. sum of money which the mortgagor is liable to pay on the happening of a future event. For example, where A executed a mortgage to secure the payment of all the costs in an appeal which may be incurred by B, it was held that the mortgage was executed to secure a contingent liability.

Lastly, consideration in the mortgage may also be an 'engagement' which gives pecuniary liability against the mortgagor. Word 'engagement' as used in this section means a contract within the meaning of Section 2 of the Indian Contract Act. Just as a breach of contract results into pecuniary liability, the 'engagement' contemplated here should also arise in some pecuniary liability. Pecuniary liability means liability to pay a sum of money. So, in order to secure such pecuniary liability, a mortgage may be executed. For instance, A borrows paddy from B and mortgages his field to secure return of the paddy and also some additional paddy in the form of interest. Paddy has pecuniary value, therefore, borrowing paddy is like borrowing money. It was held that the transaction was mortgage and the engagement to return paddy with interest was an engagement (contract) which gives rise to pecuniary liability of A (mortgagor).⁵

3. *State of Kerala v. Cochin Chemical Refineries*, A.I.R. 1968 S.C. 67.

4. A.I.R. 1922 Pat. 299

5. *Ram Chand v. Ishwar Chandra*, A.I.R. 1921 Cal. 172 (F.B.).

Where the agreed consideration was not paid by the mortgagee, not possession was handed over by the mortgagor, it was held that the mortgage advance was not rendered void or ineffective merely because the mortgagee failed to no decree would be passed in his favour. Since he had not given any money he could not have asked for anything.⁶

When a transfer is mortgage?—The Act does not prescribe any particular form or words to be used in a deed of mortgage. If the language of an instrument is sufficiently clear to indicate that there is transfer of an interest in an immovable property for securing some loan, the deed is regarded as mortgage. The form of expression, and the words written are not to be so much regarded as the real meaning of the parties which the transaction discloses.⁷ When the question arises as to whether a transfer is mortgage or not, the Court will ascertain the intention by looking at the substance of the transaction. In essence, the transfer must be for security of a debt. Nomenclature (name) of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone because it is the real intention which requires to be gathered.⁸ In *Indira Kaur v. Sheo Lal Kapoor*,⁹ A executed a sale-deed in favour of B on a certain sum of money. On the same day another document was executed by B in favour of A agreeing to sell the property in question for the same amount within 10 years of the date of execution of the sale-deed by A. The possession of the property remained with A and he was to pay Rs. 80 per month as rent to B. Municipal taxes etc. were to be paid by A. The question arose whether the transaction between A and B was mortgage or not? The Supreme Court held that the transaction in question was, in essence and substance, a mortgage although from its language it looked like a sale.

It is, therefore, irrelevant as to what name has been given to the document. It is the content which explains the nature of transaction intended in the document. The document which is to be regarded a deed of mortgage must suggest the relationship between transferor and transferee as that of debtor and creditor Sale with a condition of retransfer is not mortgage because there is no relationship of debtor and creditor between transferor and transferee. Where such relationship exists *i.e.* there is existence of debt and there is a transfer by way of security of such debt, the transfer is mortgage. In *Indira Kaur's* case stated above, since such relationship was found to exist between transferor and transferee, the Supreme Court held that the document was mortgage even though it was given the name of a sale-deed. However, in certain cases *e.g.* in mortgage and a sale with condition of retransfer, it is difficult to find out the intention of the transferor. What actually transferor meant in the document is to be gathered on the basis of evidence produce before the Court. In *Bhaskar*

Woman Joshi v. Narayan Rambhadas Agrawal,¹⁰ the Supreme Court rightly observed thus:

"If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence, as may by law, be permitted to be adduced to show in what manner the language of the deed was related to existing facts."

KINDS OF MORTGAGE

Section 58 provides following kinds of mortgage:

- (1) Simple mortgage,
- (2) Mortgage by Conditional Sale,
- (3) Usufructuary mortgage,
- (4) English mortgage,
- (5) Mortgage by deposit of title-deeds, and
- (6) Anomalous mortgage.

The classification of mortgage, has been made on the basis of the nature of interest which is transferred for securing the loan. Accordingly, there is difference in the rights and liabilities in each kind of mortgage. These six kinds of mortgage differ also regarding the formalities necessary for effecting them. The classification is also called as various *forms of mortgage*. A brief account of each kind of mortgage is given below:

1. Simple Mortgage : S. 58 (b).—Where the mortgagor promises to pay the mortgage-money (loan) without delivering possession of the mortgage-property and agrees expressly or impliedly that in case of non-payment of loan, the mortgagee shall have the right to cause the mortgage-property to be sold, the mortgage is a simple mortgage. The characteristics of a simple mortgage are as under:

- (a) The mortgagor takes a personal undertaking to pay the loan.
- (b) The possession of the mortgage-property is not given to the mortgagee.
- (c) In the case of non-payment of loan the mortgagee has right to have the mortgage-property sold.

(a) Mortgagor's personal obligation.—The first essential feature of a simple mortgage is that mortgagor binds himself personally for the repayment of loan. Such personal liability may either be express or implied. It is express if the mortgagor, in clear words, takes personal undertaking that he shall repay the money to the mortgagee. It is implied where such undertaking by the mortgagor is inferred from the terms of contract. For instance, where a person

6. *Basantilal v. Pimpri*, AIR 2008 Raj 72.

7. *Hannoman Persad v. Baboo*, (1856) 6 M.I.A. 393.

8. *Tamboli Ramchandra Motilal v. Chanchi Chiman Lal Kishan Lal*, AIR 1992 S.C. 1237.

9. AIR 1988 S.C. 1074.

10. AIR 1960 S.C. 301.

takes loan and specifies his property by way of security for repayment of the money, necessarily he undertakes also to repay the money. The very acceptance of loan involves personal liability of the borrower. The fact that some immovable property has been mentioned as security for its repayment, does not displace the personal liability of mortgagor to repay the loan with interest.¹¹ It is to be noted that for a simple mortgage, the existence of personal liability of the debtor is necessary whether it is express or implied. In the absence of personal covenant (implied contract) for repayment of loan, the transaction is not mortgage.¹²

(b) *No delivery of possession*.—Another essential element of a simple mortgage is that possession of the mortgage-property is not given to the mortgagee. This element of simple mortgage distinguishes it from usufructuary mortgage in which possession of the mortgage-property is given to the mortgagee who gets right of enjoyment of that property. Under a simple mortgage, the mortgagee is not entitled to get possession of property. If possession is given to the mortgagee, the transaction would become a 'simple mortgage usufructuary' and would come under the category of anomalous mortgage given in Section 58(g) of this Act.

(c) *Right to have property sold*.—In a simple mortgage, it is necessary that mortgagee is given the right to cause sale of the mortgage-property in default of payment. If mortgagor fails to return back the loan, the mortgagee must be entitled to recover his money by causing the sale of the property. Mortgagee himself has no power to sell the property; he has to get a decree from the Court for the sale. When the property is sold by intervention of the Court, the mortgagee shall get the money advanced by him with interest. Remaining part of the proceeds of sale is given to the mortgagor whose property was sold. The right to 'cause mortgage-property to be sold' is an essential element of a simple mortgage and this right must be given to mortgagees expressly or impliedly. Where the document does not give this right to the creditor, the transaction is not a simple mortgage. As discussed earlier, in every mortgage, there is transfer of some 'interest' of the property. In simple mortgage, the interest transferred in favour of mortgagee is his right to 'cause the mortgage-property sold' in default of non-payment of loan.

Mortgagee's Remedy.—In a simple mortgage, if the mortgagor fails to repay the loan within stipulated date, following two remedies are available to the mortgagee:

- (i) Since in simple mortgage the mortgagor takes personal obligation to repay the loan, the mortgagee may sue the mortgagor personally for recovery of the money. In such a case, he shall get simple money decree.
- (ii) The mortgagee may also move the Court for the sale of mortgage-property so that he may recover his money. In such a case he gets a

11. *Ram Narayan Singh v. Adindra Nath*, A.L.R. 1916 F.C. 119, cited in Mulla, TRANSFER OF PROPERTY ACT, Ed VII, p. 376.

12. If some immovable property is specified as security, but there is no personal liability of the debtor, the transaction is generally a 'charge'.

decree for the sale of property. Proceeds of the sale are applied for payment of the debt with interest and the remaining part of it is returned to the mortgagor.

However, the mortgagee may put both the cause of actions in one suit. He may sue the mortgagor personally and may also request the Court for a decree in his favour for the sale of property. But, in all the cases, the suit must be filed within twelve years from the date on which the loan (mortgage-money) becomes due.

The practice of taking loan by way of simple mortgage was common in India and it was called by different names in various parts of this country. For instance, in South India it was known as *muddakariyam* or *Drisia Bhundaku* or *Adaimana pattaram* or *Tanaka* or *Panayam*. In Bengal simple mortgage was called as *Bhandaikhiat* or *Kakobula* and in Bombay it was known as *Taran Galan* or *Nazar Galan*. In the Uttar Pradesh it was known by different names, such as, *Relan*, *Mustagruq* or *Arh*.

Registration.—Simple mortgage can be made only through a registered document. Even if the sum of money secured is less than Rupees one hundred, a simple mortgage must be effected by registered instrument.¹³

Mortgage in favour of minor.—By virtue of the provision in Section 11 of the Contract Act, 1872, it has been held that minority of the mortgagee renders the mortgage in his favour to be *void ab initio*. Apart from this fact, the Supreme Court found the mortgage in question to be a simple mortgage. The mortgagor had not handed over the property. He had only given the undertaking that if he failed to pay back the principal amount with interest, it could be recovered from the specified property which was subjected to the charge.^{14a}

2. Mortgage by Conditional Sale : S. 58 (c).—Mortgage by conditional sale is an apparent sale with a condition that upon repayment of the consideration amount, the purchaser shall retransfer the property to the seller. Although, the whole transaction looks like a conditional sale yet, in essence the intention of the parties is to secure the money which the seller takes as loan from the purchaser. Mortgage by conditional sale was very well known in this country. Among the Muslims it was a common mode of securing a debt. In a simple mortgage, the mortgagee generally gets also interest. Since taking interest was considered against the principles of Islam, simple mortgage could not be common among them and they introduced *bye-bil-ugla* which was mortgage by conditional sale. In this form of mortgage, the Muslim creditor got his principal money and interest in the shape of an enhanced price on repayment. At the same time, recovery of loan and his religious belief both were safe. It was common also among the Hindus as a mortgage which became a sale on non-payment of debt. The Transfer of Property Act has now recognised this form of mortgage with modifications.

Essential element of mortgage by conditional sale.—According to Section 58 (c) the mortgage by conditional sale has following essential elements :

- (1) There is an ostensible sale of an immovable property.

13. See Section 59 of the Transfer of Property Act, 1882.

14a. *Mahimai Mahimai v. Joseph Murry*, A.L.R. 2014 SC 2277.

(2) The sale is subject to any of the following conditions:

- (a) On non-payment of mortgage-money (price) the sale would become absolute or,
- (b) On payment of mortgage-money, the sale shall become void or the buyer shall retransfer the said property to the seller.

(3) The condition must be embodied in the same document.

Ostensible Sale.—Ostensible sale means a sale which apparently looks like a sale but in reality there is no sale. In this mortgage, apparently there is a sale of an immovable property but in reality it is intended to secure a debt. The whole transaction is given the appearance of a sale. The seller would sell his property on a certain sum of money. But, seller and buyer both know and intend that seller is taking loan from the buyer. Such intention is inferred from the nature of condition attached to the sale. Accordingly, after sale, the property does not vest in the buyer. In *Prakasam v. Rajambal*,¹⁴ the document was described as a sale deed but the stamp paper was provided by transferor and the consideration (price) was much less than the actual value of the property. There was a specific condition that on payment of 'principal' amount the property should be reconvened. It was held by the Madras High Court that the transaction was a mortgage by conditional sale and not an outright sale. Where A, the owner of a land, gave possession of his land to B on receipt of money from him, and under the agreement B was to execute reconveyance on payment of amount by A otherwise the sale was to be confirmed, the Bombay High Court held that the transaction was sale with condition to repurchase and not a mortgage by conditional sale. It may be noted that in this case, payment of interest was not stipulated in the agreement. Accordingly, the court found that there was no intention of parties to treat the transfer of land as 'security for debt' which is an essential feature of a mortgage.¹⁵

Whether a transaction is sale or mortgage by conditional sale is decided on the facts on record.¹⁶ In *Tulsi v. Chandrika Prasad*,¹⁷ the facts were that there was only one transaction. It included also the right of redemption of mortgage. Normally the stamp-duty is paid by transferor in a sale-deed. But here, the stamp-duty was paid by the transferor. On these facts, the Supreme Court held that this transaction is a mortgage by conditional sale, it was not a sale.¹⁸

14. A.I.R. 1975 Mad. 282.

15. *Kamati Shrinijno Kekar v. Gajabai Sopanno Algaude*, A.I.R. 2001 Bom. 369.

16. *C. Raghunandan v. K. Nageswar Rao*, AIR 2009 AP 205, the mortgagee specifically pleaded that the transaction was one of mortgage. The other party in his written statement maintained a blisful silence about it and did not deny the assertion. He was not allowed to say that the transaction was not a mortgage.

17. A.I.R. 2006 S.C. 3359.

18. *Vasantho v. Kishanrao*, AIR 2008 Bom. 42, whether the transaction in question is mortgage by conditional sale depends upon the intention of the parties which is the most relevant consideration. If the condition of re-conveyance is enumerated in the document itself, it is mortgage. The condition in this case was that if the mortgage money was not paid within five years, the document would be deemed a sale. The Court said that the use of the word "mortgage money" showed that the transaction was intended to be mortgage. *Ramadevi v. Dhill Singh*, AIR 2008 SC 2015, there was a finding of fact that the document was a deed of sale and not a mortgage, the mortgagee continued to be in possession. The Supreme Court declined to interfere, deemed sale under Section 164 of the U.P. Zamindari Abolition and Land Reforms Act, 1950.

Existence of Debt.—Although in appearance the transaction may be like a sale but, since the intention of the parties is to treat it as security for debt, and therefore there must exist a relation of debtor and creditor between seller and buyer. The existence of debt is necessary. Where no debt exists between seller and buyer, the sale is not mortgage. For instance, a sale-deed provided: "I have sold this land to you for Rs. 600 and have given the land into your possession. If at any time I require back the land I will pay you the aforesaid Rs. 600/- and any money you may have spent for bringing the land into good condition, and purchase back the land". On these facts the Bombay High Court held that the document was not mortgage; it was a sale because no debt existed between the parties.¹⁹

Conditions.—The characteristic feature of this form of mortgage is that it is a sale but becomes mortgage because of any peculiar condition attached to it. The existence of debt is inferred from the very nature of condition which makes it a mortgage. The condition may be that when seller repays the price the sale shall be void or the buyer would execute reconveyance of the property in favour of seller. Or, the condition may be that if the seller does not repay the price on a certain date the sale would become absolute, i.e., the property shall vest in the buyer. Thus, whether an ostensible sale becomes a sale in the real sense and property goes to the buyer absolutely or the sale does not take place and property continues to belong to seller, depends on fulfilment or non-fulfilment of condition. However, at the time of execution of the sale deed there is no intention that the sale in appearance is to result into sale in reality.²⁰

Transfer of property by mortgage.—Where a mortgagee under a conditional sale transferred the property to another person, it was held that the mortgage in question had no right to make any such transfer. He had obtained the property as a security after advancing a sum of money as a loan. He was also under an agreement to return the property on receiving his payment within 3 years. No title or interest had passed to the mortgagee. He was not competent to convey any title or interest to any body by transferring the property to him.²¹

Condition in the same document.—It is necessary that any of the conditions mentioned above, must be incorporated in the same document which has been executed as a sale deed. This provision was added by proviso to Section 58(c) by the Amending Act of 1929. In *Pandit Chinnann Jha v. Shreekh Lalad Ali*,²² the Supreme Court held that proviso to Section 58(c) makes it

19. *Gurramthi v. Yammannu*, (1911) 35 Bom. 258. See *Mitras, Transfer of Property Act*, Ed. XIII, p. 472. *Rajputi Devi v. Preeti Nandan Singh*, AIR 2013 Pat 166, the deed embodied condition of repayment of consideration money, possession was delivered for 2 years, during which the mortgagee had to pay back, the mere fact that amount paid was equal to price did not make it an outright sale. The mortgagee entitled to take back the property.

20. *Ramli v. Bhugtu*, AIR 2006 SC 623. *Jirambhai Kumbharji Rohini v. Brijnandan Naranbhai Barot*, AIR 2013 Guj 272, the transferee from the mortgagee did not appear to defend his position nor did the mortgagee appear. Such transfers are even otherwise void.

21. *Pandit Chinn Chinn Jha* was noted by the Supreme Court in *Bishannath Prasad Singh v. Kalyan Prasad*, (2006) 4 SCC 423 : 2006 AIR SCW 4235 for expressing the opinion that the parties' description of their deed is not determinative of its real character. Also to the same effect *Tilasi v. Chaitrathi Prasad*, AIR 2006 SCW 4905, condition should be incorporated in the same document, otherwise it is not mortgage. To the same effect, *Chaitr Shikhar Prasad v. Brijnanna Mand Singh*, (2008) 8 SCC 287.

clear that if the condition for re-purchase is not embodied in the document which effects or purports to effect the sale, the transaction cannot be regarded as mortgage. Thus an ostensible sale with any of the conditions mentioned above, cannot be regarded as a mortgage unless the condition is laid down in the same document.^{21a} Before this amendment, there was some doubt as to whether the sale deed amounted to mortgage if condition was laid down in a separate document. Now, the law is clear that such condition must be included in the sale deed itself.²² In *Sunil v. Agilior*,²³ separate documents of sale deed, deed of reconveyance and lease deed were executed in the same transaction but the condition effecting the sale as a mortgage was not embodied in the sale-deed itself. The Gujarat High Court held that the transaction was not in the nature of mortgage by conditional sale. The Court further observed that the condition purporting to effect a sale as mortgage transaction must be incorporated in one and the same document. Where documents for sale and re-sale were executed on two different dates, the Rajasthan High Court held that the transaction could not be treated as mortgage under Section 58 (c) of the T.P. Act.²⁴

In a case before the Supreme Court, the plaintiff's father entered into a transaction with the defendant. The deed was titled as a conditional sale. The market price of the land was higher than the specified consideration at the relevant point of time. The transaction was that the plaintiff was to have the title in the property for a period of five years. He was to remain in possession for that period only. The plaintiff was entitled to tender the amount not only at the expiry of the period but also before. On such tender the defendant was required to execute the deed of conveyance in favour of the plaintiff. The terms of sale and conditions of re-purchase were recorded in the same document. It was held that the transaction was not a sale but a mortgage.²⁵

In another Supreme Court decision, the property conveyed was leasehold interest in half share of the plot in dispute. The stipulation for re-purchase with a time-limit was included in the same document. The amount payable on re-purchase was not stipulated. The vendee was given possession with right to attorn to the landlord. There was nothing to show borrower-lender

21a. *Raj Kishore v. Prem Singh*, AIR 2011 SC 382, any sale accompanied by agreement for reconveyance of the property is not to be regarded as a mortgage by conditional sale unless the requirements of the provisions in the section are satisfied. *Jeyaraj Chinnai Das v. Kirika Devi*, AIR 2014 Gau 10, document of mortgage brought into existence subsequently, and was also of doubtful validity, sale became absolute.

22. The principle was applied in *Manjibai Krishna Patil v. Rajkumar Ketaji Patil* (2007) 12 SCC 427, two documents executed, the transaction not a mortgage by way of conditional sale. It would be a deed of sale coupled with an agreement of re-conveyance. *Raj Kumar Rai v. Durga Prasad*, AIR 2009 MP 218, both the aspects should be in the same document. *Bhivanta Rudhrai v. Nitunip Behari Dhanoli*, AIR 2009 Gau 114, it is not *sine qua non* to embody the condition of mortgage in the sale deed. If the condition of mortgage is incorporated in a separate document, it would also be mortgage by conditional sale, in this case a separate agreement was executed on the same day to reconvey the property. This showed that the sale was not absolute but conditional. *S.K. Md. Ilyas v. Manjari Sahi*, AIR 2009 Pat 17, the condition of re-purchase was embodied in the same document, the value of land under the transaction was much less than the actual value, only possession was handed over, but no rights or title under any deed, all this showed that the transaction was a mortgage by conditional sale and not out and out sale with a right of re-purchase.

23. *A.R. 1989 Gau 39*.

24. *A.R. 1989 Gau 131*.

25. *Vishwanath Dadaiah Kamte v. Parisa Shantappa Upadhye*, AIR 2008 SC 2510, Another similar case on variance between real market value of the property and that specified in the transaction was *P. L. Bagustam v. N. Pating Gounder*, AIR 1966 SC 902.

relationship. The transferee had already acquired the other half of the property. The Court attached importance to the fact that the parties being related, there was a less chance of a mortgage transaction between them. Hence, it was a transaction of conditional sale.²⁶

Where both the features of a mortgage deed by conditional sale and as sale with condition to repurchase existed in the same document, the Court held that the Courts lean to construe a document in favour of the person who is claiming the right to redeem, the Court took the document to be that of a mortgage entitling the plaintiff to redeem the mortgage and get back his possession.^{26a}

Registration.—Where the consideration amount or the mortgage-money is Rs. one hundred or more, the document must be registered.

Mortgage by Conditional Sale and Sale with Condition of Repurchase

Distinction between.—Mortgage by conditional sale and a sale with condition of repurchase appear to be almost similar transactions. But, these two transactions may be distinguished as under—

(i) In a mortgage by conditional sale, the existence of debt between seller and buyer is necessary. But in a sale with a condition of repurchase (retransfer) there does not exist any debt. There is no relation of debtor and creditor between seller and buyer.

(ii) Mortgage by conditional sale is transfer of only some interest in the property; it is, therefore, transfer of partial interest. Sale with condition of repurchase is transfer of all the interest in property except a personal right of repurchase which is lost if not exercised within a certain date.

In so far as the legal nature of these two transactions is concerned, the distinction is clear. Mortgage by conditional sale involves existence of debt whereas there is no debt in a sale with condition of repurchase. But, sometimes it is difficult to decide whether the transaction is mortgage or sale with condition of repurchase. This is so because in effect both the transactions provide for retransfer of property by buyer to seller. However, existence or non-existence of any debt between seller and buyer makes a fundamental difference between the two. The existence of such a debt is a matter of intention of the parties which may be known on the basis of facts and circumstances of each case. An agreement for repurchase was executed subsequent to the sale-deed and there was no condition in the deed that on failure to make payment by seller the sale shall become absolute. The Madhya Pradesh High Court held that the transaction was a sale; it was not mortgage by conditional sale.²⁷ On the other hand, in *Balubhai Jethibhai Shah v. Chhannaubhai Bamaubhai*,²⁸ the stipulation in the document described it to be a transaction of conditional sale. The condition provided that at any time within 10 years of its execution the seller could return the same amount of consideration as paid by the buyer and thereupon the land would be returned to seller. The Gujarat High Court held that it was a mortgage by conditional sale and there was no outright sale. The Court observed that mere description of the transaction in a document that

26. *C. Chennu v. P. Narayana, Enghimthiri*, AIR 2009 SC 1502.

26a. *Ramagouda v. Boranna*, AIR 2012 Kar 52.

27. *Ranjana Kinn v. Balu Koginath Dass*, A.I.R. 1992 M.P. 22.

28. AIR 1991 Gau 85.

there was a sale, does not make the document a sale-deed; the relevant factor is the intention of the parties. The Court observed further that no buyer intending to purchase immovable property would put his title to jeopardy for a period of 10 years nor would he agree to return the property for the same price at which he has purchased during any time upto 10 years from the date of purchase. Reference in such a document to possession being handed over at time of sale as well as at time after seller has returned the sale consideration to buyer, was also indicative of the fact that no out right sale was intended and the parties intended to bring about relationship of a creditor and a debtor securing the debt by mortgaging the land.

Mushir Mohammad Khan v. Sajida Bano,²⁹ is an interesting case in this regard. There was a separate agreement of reconveyance executed by purchaser under which he promised to reconvey the property to the seller on return of the sale-consideration. There was also a third document executed by seller in favour of purchaser in the form of rent note. The Supreme Court held that on considering these documents, the transaction was not a mortgage or mortgage by conditional sale nor a usufructuary mortgage. Where the parties have executed three documents, almost simultaneously, all the three documents are to be taken into account to find out the true nature of the transaction. The Supreme Court observed that the Madhya Pradesh High Court (which treated the transaction as usufructuary mortgage) did not take into consideration the second document which represented an agreement between parties, that if the price-money for which sale was executed by the plaintiff in favour of the defendant, was returned within the stipulated time, the defendant would reconvey the property to the plaintiff. Further, the Supreme Court observed that although it was found that plaintiff (seller) had offered Rs. 1 Lakh to be paid within six months, the defendant (purchaser) made a counter-offer of Rs. 1.5 Lakh but, the plaintiff was not prepared to transfer the title in the property. This indicated that the amount (Rs. 1000) for which the property was sold did not represent the true market value, neither at the time of sale deed executed in favour of defendant (purchaser) nor subsequently. Accordingly, in order to do justice in such situations, the Apex Court held that "if the defendant (purchaser) pays a sum of Rs. 2 Lacs (foregoing also the arrears of rent update) within three months, the judgment of High Court shall stand set aside i.e. the transaction would not be treated as usufructuary mortgage. "In case the amount is not paid within aforesaid period the appeal shall stand dismissed."

29. AIR 2000 SC 1085 : *Abdul Sami Qureshi v. Sardar Kuldeep Singh*, AIR 2008 NOC 840 All. condition of re-purchase introduced subsequently into the transaction became effective. The right of re-purchase became nullified because the conditions as to certain payments were not fulfilled. *Bishanmuth Prasad Singh v. Rajendra Prasad*, (2006) 4 SCC 432, the sale was subject to the condition of repurchase-reconveyance. The Court held that this was not a mortgage but a sale proper. The seller having not exercised the option of repurchase within the specified time, he was not entitled to say that the transaction should be regarded as a mortgage so as to enable him to redeem it. *Chennammal v. Muthulingam*, AIR 2005 SC 4392, the true nature of the transaction has to be ascertained by examining the intention of the parties as revealed by the facts of the case. The Court found the transaction to be a loan transaction, the property was transferred as a security for 1/4th of the real value and there was obligation to return it on repayment. Hence, a mortgage accompanied by conditional sale. The distinction between them was also explained in *Talsi v. Chandan Rai*, AIR 2006 SC 3359, testimony of the scribe of the document, recitals in the document, person by whom stamp duty paid, mutation, if effected in revenue records, are relevant facts. *Ramul v. Pargun*, AIR 2006 SC 622.

Note.—In this case the Apex Court expressed concern on increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right of redemption within the prescribed period of limitation. Judgment as given in this case, would discourage an unscrupulous mortgagee who in place of getting the mortgage-deed executed in lieu of agreement to sell in his favour from the mortgagor so as to pressurise the mortgagor by seeking to enforce specific performance by mortgagee for obtaining possession for an amount smaller than the real value of the property.

Stipulation for return of property in a document of sale

The transferor sold his land to the purchaser by way of a document of sale. The purchaser was put in possession and used and enjoyed the property as an absolute owner. But the sale document contained a stipulation that on repayment of the sale amount, the purchaser would return the property to the seller. The Supreme Court held that a mere stipulation for return of property to the seller in a document of sale does not constitute the transaction to be a mortgage by conditional sale. The suit for retake of property was filed in this case a long time after the period stipulated for return had expired. Such suit was liable to be dismissed.^{29a}

3. Usufructuary Mortgage : S. 58 (d).—Mortgage is usufructuary where the mortgagor gives possession of the property to mortgagee. Since possession is with mortgagee, he gets the usufruct i.e. produce, benefits, rents or profits of the mortgage-property. In a usufructuary mortgage, the mortgagee is entitled to enjoy the benefits of mortgage-property in lieu of interest on the principal money (debt) advanced by him. So, on payment of debt (principal money) the mortgagee has no right of possession. Where the property is capable of giving good produce or benefits, the parties may also agree that mortgagee is entitled to get the usufruct of property not only in lieu of interest but also in part-payment of the money advanced. This form of mortgage is also common throughout the country and is called by its different local names. For example, in Madras it is known by the name of *Diggu Bhogam* or *Suwalin Adamanni*, in Bengal it is called as *Bhoga Bandhaki* or *Khni Khalsi* and in Uttar Pradesh it is known as *Bhog Bandhaki*. In Punjab this form of mortgage is called *Lehia Mukhi* mortgage.

Essential elements of usufructuary mortgage.—The essential elements of usufructuary mortgage are as under :

- (i) Delivery of possession of the mortgage-property or, an express or implied undertaking by mortgagor to deliver such possession.
- (ii) Enjoyment or use of the property by mortgagee until his dues are paid off.
- (iii) No personal liability of the mortgagor.
- (iv) Mortgagee cannot foreclose or sue for sale of mortgage-property.

Delivery of possession.—The characteristic feature of usufructuary mortgage is the transfer of possession of mortgage-property to mortgagee. Right

29a. *Venulabhai Baghelbhai Illage v. Shantaram Babu Rao Bhatnagar*, AIR 2013 SC 2924. The Court followed its own earlier decision to the same effect in *Tamoli Ramnath Motilal v. Ghanshi Chintamal Keshavnath*, AIR 1992 SC 1236; *Moya Devi Pandey v. Samiti Mathur*, AIR 2014 NOC 171 All. nothing in the document suggested that the vendor did not intend to transfer absolute ownership to vendee, no stipulation of retransfer, held sale, not mortgage by conditional sale.

of the mortgagee to retain possession of property is 'security' for payment of his money. Where the mortgagee is entitled under the mortgage-deed to continue possession of property until payment of mortgage-money, the transaction is usufructuary mortgage. It is not necessary that delivery of possession is made at the time of execution of the deed. The mortgagee may take an undertaking that he would deliver the possession on a future date. Such undertaking or promise may either be express or implied. Therefore, whereunder the terms of a mortgage-deed the possession is to be delivered to the mortgagee subsequent to the date of mortgage, the transaction is still a usufructuary mortgage. The mode of delivery of possession depends upon the nature of property. Where the mortgage-property is a tenanted house the only way in which possession can be given to mortgagee is to give him the right to collect the rents and appropriate them towards the debt.³⁰

Where as per the mortgage deed, the mortgagee himself had to keep possession, but he transferred possession to another person who was cultivating the land. It was held that the possession of the mortgagee being on personal basis, the transferee had no legal right of being regarded as a tenant, etc.^{30a}

Enjoyment of rents and profits.—In a usufructuary mortgage, the mortgagee has right to 'use' the property until the debt is fully paid. Generally, the mortgagee adjusts the interest from out of the rents and profits of mortgage-property. As soon as capital money (loan) is paid by the mortgagee, the mortgagee vacates possession. The rents and profits during possession are appropriated by the mortgagee in lieu of interest on the money given to mortgagee. But the parties may also agree that "part of such rent and profits" are to be treated as interest and the remaining benefits are to be taken by mortgagee in discharge of the debt. Accordingly, under the mortgage-deed the parties may agree that rents and profits are (i) in lieu of interest or, (ii) in lieu of principal money, or (iii) in lieu of principal and interest both. In case where rents and profits are in lieu of interest, the mortgagee gets back the possession of property as soon as he pays the debt. Where the rents and profits are agreed to be retained by mortgagee in lieu of only the principal money, the mortgagee is entitled to get back the possession when he pays the principal money. Here, it may be possible that rents and profits during possession may exceed the principal amount but mortgagee cannot recover possession until the principal money is paid by him. But, where some part of rents and profits are agreed to be retained by mortgagee as interest and the remaining is to be adjusted against the principal money, the mortgagee can get back the possession only when the principal and interest both, are fully paid.

No personal liability.—In a usufructuary mortgage, there is no personal liability of the mortgagor. Mortgagee cannot sue the mortgagor personally for payment of his debt. He is entitled only to retain the possession of mortgage-property till his debt is fully paid. Since there is no personal covenant for payment by mortgagor, the mortgagee cannot compel payment of the debt. It is for the mortgagor to pay off the debt and get back possession or not. Where in a usufructuary mortgage there is a covenant that mortgagee may sue the mortgagor personally for recovery of his debt, the mortgagee does not remain a usufructuary mortgage.

No foreclosure or sale.—The mortgagee is entitled to continue in possession and enjoy the usufruct until the debt is fully paid off. He can neither sue the mortgagor personally nor can exercise his right of foreclosure under Section 67 of this Act. This right is not available to usufructuary mortgagee. It is significant to note that in this form of mortgage *no time-limit is fixed for payment*. Mortgagee is entitled to retain possession until the money due is paid. In a usufructuary mortgage the time upto which money may be paid by mortgagor is uncertain. If any time is fixed the mortgage would not be a usufructuary mortgage.³¹

Registration.—Registration is necessary when the money taken under usufructuary mortgage is Rs. 100 or more. Where the mortgage-money is less than Rs. 100, registration is not necessary; delivery of possession is sufficient.

Zurripsligi Lease.—Where the right of enjoyment of an immovable property is transferred for a fixed period of time and the rent is paid in lump sum in advance, the transaction is Zurripsligi lease. The lessee gets right to enjoy, use and appropriate the usufruct of property. There is, therefore, similarity between a Zurripsligi lease usufructuary mortgage. However, the two transactions have different legal effects. A Zurripsligi lease may be distinguished from usufructuary mortgage as under:

(i) In a Zurripsligi lease there is no existence of any debt between lessor (transferor) and the lessee (transferee). Whereas, in usufructuary mortgage, there must exist debt and a relation of debtor and creditor between mortgagee and mortgagor.

(ii) Zurripsligi leases are for a fixed term i.e. specific time-limit is provided upto which the possession is given to lessee. In usufructuary mortgage, there is no time-limit upto which mortgagee may retain possession. He continues possession and enjoyment of property until all his dues are paid off.

4. English Mortgage : S. 58 (e).—In English mortgage there is absolute transfer of property to mortgagee with a condition that when the debt is paid off on a certain date, he (mortgagee) shall re-transfer the property to mortgagor. According to Section 58 (e) of this Act, where mortgagor binds himself to repay the money (debt) on a certain date and transfers the mortgage-property absolutely subject to proviso that mortgagee will re-transfer it to mortgagor on payment of debt as agreed, the mortgage is English mortgage. Essential elements of English mortgage are as under:

- (i) The mortgagor binds himself to repay the mortgage-money (debt) on a certain date.
- (ii) The mortgage-property is transferred absolutely to mortgagee.
- (iii) The absolute transfer is subject to a proviso that mortgagee will re-transfer the property to mortgagor on payment of mortgage-money on the said date.^{31a}

31. *Himantila v. Inam Ali*, (1890) 12 All. 203; cited in Mitra's TRANSFER OF PROPERTY ACT, Ed. XII, p. 480.

31a. *Raj Kishore v. Prati Singh*, AIR 2011 SC 362, the mortgagor did not bind himself to repay the mortgage money on a certain date, sale deed did not even remotely suggest that the transaction was in the nature of a mortgage or that there was any understanding for re-transfer of the property, the seller was not a signatory to the agreement of re-conveyance, no English mortgage. The suit was for declaration of the sale as void, the seller continuing to be the owner and in occupation and not a suit for redemption.

30. *Baile Kristo v. Goudindam*, A.I.R. 1939 Pat. 540.

30a. *Mounappa Netha v. Land Tribunal Puttur*, A.I.R. 2012 Kar 161.

An essential feature of English mortgage is that mortgagor binds himself to repay the loan by transferring the property absolutely. The use of word 'absolutely' creates doubt because mortgage as such (of whatsoever form it might be) is a transfer of only some interest in the property. In every kind of mortgage only some interest is conveyed; not the absolute interest. This inconsistency occurs because this form of mortgage has been borrowed from English law where mortgagor has an equitable interest in the property both before as well as after the date of payment. In India, there is no concept of equitable estate of mortgagor. Therefore, in India interpretation of a deed of transfer of an interest in the mortgage-property. The definition of English mortgage must be read subject to the general definition of mortgage given in Section 58(a) of this Act. Consequently, an English mortgage in India can hardly be regarded as the transfer of entire estate of mortgagor to mortgagee.³² In *Ramkinkar v. Satyacharan*,³³ the Privy Council observed :

"Section 58 (e) deals with form, not substance. The substantial rights are dealt with in Sections 58(e) and 60. Whatever form is used, nothing more than an interest is transferred and that interest is subject to the right of redemption."

It is, therefore, settled law that the word 'absolutely' in English mortgage is used merely as a matter of form. What really passes to the mortgagee under this mortgage is only an interest in the property which is liable to be redeemed by the mortgagor under Section 60 of this Act.

In English mortgage, the mortgagor binds himself personally to pay the debt. In this form of mortgage the personal debt exists and despite conveyance the debtor is personally liable for the debt.

It is also necessary that specific date be mentioned upto which the mortgagor must repay the debt. The English mortgage must contain any particular date say 5th May, 1998 upto which he will repay the mortgage-money. If the mortgagor repays the money the mortgagee is bound to re-transfer the property to mortgagor. If mortgagor fails to repay the mortgage-money on the stipulated date, the mortgagee has right of sale under Section 67 of this Act. In the event of non-payment of mortgage-money (debt) under an English mortgage, a decree of foreclosure is not passed. In this form of mortgage, the mortgagee has right to apply for passing decree for sale of the mortgage-property.³⁴

Registration.—Where the principal money is Rs. 100 or more the deed of English mortgage must be registered. But, if the mortgage-money is less than Rs. 100, registration is optional.

English Mortgage and Mortgage by Conditional Sale.—English mortgage resembles with a mortgage by conditional sale because in both the forms, there is provision for transfer of ownership to mortgagee in default of

non-payment of debt. However, these two forms of mortgages may be distinguished as under :

(i) In an English mortgage, the mortgagor generally binds himself personally for the payment of debt. In a mortgage by conditional sale, the mortgagor does not necessarily bind himself personally and has his remedy only against the mortgage-property.

(ii) In an English mortgage the property is transferred absolutely which is divested by payment of the debt on due date. In a mortgage by conditional sale, there is transfer of qualified or conditional ownership which subsequently becomes absolute on non-payment of the debt. In other words, in an English mortgage the ownership remains vested in the mortgagee till non-payment but it is divested as soon as the debt is paid on the due date. On the other hand, in a mortgage by conditional sale, there is no immediate vesting ownership ; the ownership vests in mortgagee in default of mortgagor.

5. Mortgage by Deposit of Title-Deeds : S. 58 (f).—Mortgage by deposit of title-deeds is a peculiar kind of mortgage. It is peculiar in the sense that in this mortgage, execution of mortgage-deed by mortgagor is not necessary. Mere deposit of title-deeds of an immovable property by mortgagor to mortgagee is sufficient. Title deeds are those documents which are legal proof that a person owns a particular property. For instance, if A has purchased a house, the sale-deed in his favour is the title-deed establishing ownership of A in that house. Now, if A wants to take loan from B, A may execute either simple mortgage or usufructuary mortgage or any other kind of mortgage. But, in these kinds of mortgages execution of mortgage-deed and its registration may take some time because of the legal formalities. So, if A is in urgent need of money, it may not be possible for him to get the money immediately. Mortgage by deposit of title-deeds does not require formalities of execution or registration etc. Therefore, just by depositing the title-deeds to B, A may get the money immediately. Possession of title-deeds by B (money-lender) is the security for repayment of loan. In this form, the mortgage is created by mere deposit of title deeds with intent to create security thereon without any legal formality. The object of this kind of mortgage is to provide easy mode of taking loans in urgent need especially by trading community of the commercial towns. The borrowing transaction is a matter of faith or equity, justice and good conscience that money-lender advances loan only by having possession of certain papers (title-deeds) without any writing or legal formality. Mortgage by deposit of title-deed resembles the English equitable mortgage because it does not require registration and other formalities.

Equitable mortgage.—Under English law, a mortgage by deposit of title-deeds is known as equitable mortgage. It is called equitable mortgage because in the absence of any legally executed document, merely on the basis of possession words of title-deeds by mortgagor, equity would ensure return of his money. In the words of Lord Cairns, "It is well established rule of equity that a deposit of a

32. *Fadhkishnan Pal v. Jagannath Manuvaru*, A.I.R. 1932 Cal. 775.

33. A.I.R. 1939 P.C. 14.

34. *Korrick Chandan Mullick v. Purnashottam Das Gopal*, A.I.R. 1968 Cal. 247.

document of title without more, without writing, without word of mouth, will create Equity a charge upon the property referred to.³⁵ The principle on which a mortgage by deposit of title-deed is based is that the 'deposit' is to be taken as the evidence of an implied agreement to give a proper mortgage which has been partly performed. In England, mortgage by deposit of title-deed is called as 'equitable mortgage' also to distinguish it from 'legal mortgage'. In India, all the forms of mortgage, including mortgage by deposit of title-deeds, are legal mortgage because they have been incorporated in the Transfer of Property Act, 1882.

Essential elements of mortgage by deposit of title-deeds.³⁶

According to Section 58 (f), where a person in any of the specified towns, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds. Under this definition, the essential elements of a mortgage by deposit of title-deeds are:

- (i) Existence of a debt,
- (ii) Deposit of title-deeds,
- (iii) Intention to create security, and
- (iv) Territorial Restrictions; application of this form of mortgage only in specified towns.

(i) *Existence of debt*.—The title-deeds must be delivered only for securing a debt. Existence of debt is necessary. Debt may either be an existing debt or a future debt. The mortgagor may take the money all of a sudden from mortgagee by depositing the title deeds of his immovable property. He may deposit the deeds also as security for a money to be given to him in future in the event of his urgent need. Title-deeds may also be deposited with banks to secure an overdraft account. This is a common practice among the trading community or persons involved in business. Title-deeds may be deposited also to cover a general balance which may be found due on a running account.³⁷ In this form of mortgage, title-deeds are deposited under an oral agreement to secure present or future advance. When the money is advanced, there is creation of a charge upon the land comprised in the title-deeds.

(ii) *Deposit of title-deeds*.—The title-deeds of an immovable property on which security is intended to be created, must be deposited with the creditor or his agent. An equitable mortgage is valid only when some documents showing some title of the debtor in an immovable property are deposited with the

35. *Shanu v. Foster*, (1872) L.R. 5 H.L. 321 at p. 340 cited in Mulla's TRANSFER OF PROPERTY ACT, Ed. VII, p. 383.

36. *Syndicate Bank v. Estate Officer and Manager, APHC Ltd.*, AIR 2007 SC 3169, requirements reiterated, the mortgagor deposited allotment letter, licence for use of the land and possession letter, without any sale deed having been registered, the question whether the equitable mortgage was valid being too important a matter, was referred to larger Bench. *R. Janakiaman v. State*, AIR 2006 SC 1106, creation of an equitable mortgage by depositing documents other than the title deed was held to be not permissible.

37. *Maricar v. Sigg*, (1886) 2 Mad. 239 P.C., cited in Shah's PRINCIPLES OF THE LAW OF TRANSFER, Ed. III, p. 152.

creditor. Possession of such title-deeds by the mortgagee or his agent is the only security for repayment of money. However, such a mortgage is valid even if only some or any one of the material documents showing some kind of title to the property have been deposited. It is not essential that a complete title as to the debtor's interest in the property should be shown in the document. But if the documents deposited do not show any title at all and there are documents in existence showing his title to the property but they are not deposited then, an equitable mortgage is not created.³⁸ Similarly, where the mortgagor could not prove the deposit of title-deeds, there is no equitable mortgage and the mortgagor cannot recover the money. In *Syndicate Bank v. M. Shanuchappa*,³⁹ the mortgagor claimed that he had mortgaged his property by executing a memorandum of deposit of title deeds. The mortgagee (Bank) denied execution of the said deed on the ground of discrepancy in the signatures of attesting witnesses and also on the deed. The Karnataka High Court held that suit for recovery of money was liable to be dismissed because the mortgage-deed could not be proved by the mortgagor.

For a valid equitable mortgage it is not necessary that all the documents of title should be deposited or, that the documents deposited should show a complete title. It is sufficient if the deeds, deposited *bona fide*, relate to the property and are material evidence of title.⁴⁰

If original title-deeds are not available, copies of such documents may also be deposited. Any relevant document as an evidence of some title of the debtor in property may be deposited to create a valid equitable mortgage. In *C. Assiamma v. State Bank of Mysore*,⁴¹ the mortgagor deposited a registration copy of the title-deed and other relevant papers e.g. tax receipts etc. with the bank. The mortgagor claimed that he was one of the donees and had title in the property. In the original title-deed the donor had gifted properties to some persons and one of these properties was gifted to the mortgagor. Since properties were gifted to many persons by one gift-deed, all of them could not have original gift-deed. Therefore, the mortgagor deposited the registration copy of the gift-deed. On these facts, the Kerala High Court held that various documents including the registration copy of the gift-deed deposited with the bank clearly established the title of mortgagor. The Court observed that since the evidence on record showed the intention of the mortgagor to create an equitable mortgage in clear terms, it could not be said that merely because the original title-deed was not filed no equitable mortgage was created. Deposit of registration copy of gift-deed showing title of mortgagor was sufficient to create a valid equitable mortgage. Similarly, where the original title-deed is lost, a certified copy of the document may be deposited to create a valid equitable mortgage provided the original document is proved to be actually lost.⁴²

38. *Venkataramana v. Narsinga Rao*, 21 M.L.J. 454; 9 L.C. 309.

39. AIR 2003 Kant. 210.

40. *Amritha Copal Nalpanidur v. United Industrial Bank*, AIR 1981 Cal. 404.

41. AIR 1990 Ker. 157.

42. *Syndicate Bank v. Modern Tile and Clay Works*, (1980) K.L.T. 550.

Delivery of possession of the title-deeds may either be actual or constructive. Section 58 (f) does not require that the debtor himself should produce the documents and deposit them with the mortgagee (creditor). If the intention was to deposit the documents to secure the debt and the documents were forwarded either through the agent of the debtor or through the agent of the creditor, the ultimate deposit is sufficient to create equitable mortgage.⁴³ Further, it is also to be noted that physical delivery of the title-deeds is not always necessary. It may also be constructive. In *Ishwar Das v. Dhanang Singh*,⁴⁴ an additional amount was advanced to the mortgagor (debtor) on the agreement that mortgagee (creditor) will be entitled to retain the documents as security also for the additional amount. The Delhi High Court held that the agreement was to be treated as constructive delivery of the title-deeds to the creditor. It is unnecessary to require the deeds to be put back in the hands of debtor and redeposited when they are already in the possession of creditor for earlier mortgage.

A memorandum of deposit of title deeds is not a mere receipt or acknowledgment of documents already deposited as a security. The memorandum being a self-contained document creating rights and charges over property was liable to be registered. But it being not registered, the Court said that it could not be looked into for establishing the transaction.⁴⁵

(iii) **Intention to create security.**—Mere deposit of title-deeds is not sufficient. The title-deeds must be deposited by the debtor with the intention of creating security for a debt. The only fact that there is some debt and that the title-deeds of debtor are somehow found in possession of the creditor would not be sufficient to create an equitable mortgage. There must be a *bona fide* intention that possession of title-deeds with the creditor is by way of security for the money advanced by him. However, intention to create security by deposit of title-deeds is a question of fact and not of law.⁴⁶ Therefore, the facts that title-deeds are in custody of the creditor or that there exists a debt, both alone cannot give rise to a presumption that there is an equitable mortgage. There is no equitable mortgage unless there is a *connecting link between the debt and the possession of title-deeds* suggesting a definite intention on the part of the debtor that deeds are in possession of creditor as security for the debt.⁴⁷ Where the title-deeds of a partner were in possession of the managing partner and the managing partner admitted that he received the title-deeds in the capacity of a manager, the Privy Council held that there was no intention to create an equitable mortgage because delivery of the deeds was merely a part of the partnership transaction.⁴⁸ It may be concluded, therefore that even the possession of deeds by the creditor coupled with the existence of a debt need not necessarily lead to the presumption of a mortgage. But, in a given case, unless

43. *Sulochana v. Pandiyon Bank Ltd.*, A.I.R. 1975 Mad. 70.

44. A.I.R. 1985 Delhi 83.

45. *Huqvi Pargol v. Senthilvelu Kesavan Sundaram*, AIR 2009 Kar 160 (DB).

46. *K.J. Nathan v. S. Maruthi*, AIR 1965 SC 430.

47. *Jethiben v. Puthibai*, (1912) 14 Bom. L.R. 1020.

48. *Hem Moh v. Lim Saw Yenn*, AIR 1923 P.C. 87.

and until the defendants satisfactorily explain as to how and as to why the documents came to the plaintiff's custody, the said fact would be significant and may lead to presumption of mortgage.⁴⁹

(iv) **Territorial restrictions.**—Mortgage by deposit of title-deeds is applicable only in certain specified towns of this country. Like other kinds of mortgages, an equitable mortgage is not applicable throughout the country. The mortgage by deposit of title-deeds may be made only in Calcutta, Bombay and Madras and in such other towns which the State Government may by notification specify in the official Gazette. Besides the above-mentioned big cities, by notifications, a number of commercial towns have now been specified where mortgage by deposit of title deeds may take place. Some of the towns where this kind of mortgage can now take place are : Agra, Ajmer, Ahmedabad, Allahabad, Alleppey, Alwar, Ambala City, Arrah, Bangalore, Baroda, Bhagalpur, Bikaner, Chapra, Cochin, Delhi, Ernakulam, Guahati, Gaya, Jaipur, Kanpur, Kottayam, Lucknow, Madurai, Mysore, Nandyal, Nellore, Patna, Raikot, Shillong, Silchar, Surat, Tezpur, Tirupath, Trivandrum, Udaipur etc. These are only some of the towns to which the application of Section 58(f) has been extended from time to time by official notifications. It is to be noted that the very object of an equitable mortgage is to provide an easy method of taking frequent loans for trade or business purposes. Therefore, facility of such mortgage has been made available in big Commercial towns or cities which are business centres.

In Punjab where this Act is not applicable, mortgage by deposit of title-deeds has been accepted as equivalent to simple mortgage and is a valid mortgage. Section 58(f) has been extended to Haryana.

Property may be situate anywhere.—It is significant to note that territorial restriction is only with regard to the place where transaction takes place. The only transaction in the equitable mortgage is the deposit of title-deeds of an immovable property. So, the title-deeds of the property are to be deposited in any of the towns to which this section is applicable. In other words, the restriction to the specified towns refers to the place where title-deeds are delivered and not to the place where property is situated.⁵⁰ The mortgage-property may be situate outside the specified towns or it may be partly situate within and partly outside the towns specified. But, the transaction i.e. deposit of title-deeds, must take place within the area specified (town) may be effected by a deposit of title-deeds in Calcutta. In this regard, it is necessary to note that an equitable mortgage essentially means debt is more significant with the intention of securing debt. Intention of securing *Maruthi*,⁵¹ the physical delivery of the title-deeds had taken place outside the towns specified. But the intention to create equitable mortgage by these

49. *M.M.T.C. Limited v. S. Mohamad Gani*, AIR 2002 Mad. 378.

50. *Bahann v. Sonbhi*, (1914) 38 Bom. 372; *State of Haryana v. Mohir Singh*, AIR 2014 SC 339, an order of the High Court directing the State to enter mutation of property mortgaged by deposit of title deeds without considering that it was in the territory where such mortgages were not permitted, the mortgage was set aside and the case remanded for consideration afresh.

51. AIR 1965 SC 430.

deeds was formed after delivery of the deeds and in a town which was within notified area. The Supreme Court held that an equitable mortgage was created under Section 58 (f) of the Transfer of Property Act.

Remedy in default of repayment.—Where the debtor fails to repay the debt under a mortgage by deposit of title-deeds, the creditor can recover his money just as a creditor recovers the money in a simple mortgage. That is to say, the security can be enforced by a suit for a decree for the sale of the mortgaged property. As regards the remedies of mortgagee, an equitable mortgage is, therefore, stands on the same footing as a simple mortgage. Such a suit must be filed within 12 years from the date on which the money becomes due.

Distinction between English equitable mortgage and mortgage by deposit of title-deeds.—The central idea of mortgage by deposit of title-deeds has been taken from the English equitable mortgage. Accordingly, the mortgage by deposit of title-deeds as given in Section 58 (f) is generally called as equitable mortgage. But, English equitable mortgage differs from mortgage by deposit of title-deeds in the following respects:—

- (i) The English equitable mortgage is enforceable at equity. It does not operate as transfer of an interest in the property. In India, the mortgage by deposit of title-deeds is one of the modes of creating a legal mortgage and there is transfer of an interest in the mortgage-property to mortgagee.
- (ii) In England, equitable mortgage being purely equitable, is not a complete security. It may be postponed to a subsequent legal mortgage if mortgagee has no actual or constructive notice of such prior equitable mortgage. In India, mortgage by deposit of title-deeds is a complete transfer of interest. Therefore, it cannot be postponed by any subsequent mortgage of any other form. In India a subsequent mortgagee under any other kind of mortgage (executed and duly registered) shall not get any priority over a mortgagee having only possession of the title-deeds.
- (iii) In England there is no territorial restrictions regarding applicability of equitable mortgage. In India, the mortgage by deposit of title deeds is possible only in specified commercial towns.

Registration.—Registration is not necessary. Mortgage by deposit of title-deeds may be made without any writing or registration. Mere delivery of documents with an intention, to secure a debt is enough for constituting a valid equitable mortgage. It is an oral transaction and need not be registered. However, sometimes deposit of title-deeds is accompanied by a memorandum simply in writing stating the fact of deposit of the deeds. If the memorandum simply states the fact in writing that title-deeds have been delivered, the writing need not be registered. But if the memorandum itself constitutes the contract of mortgage, it must be registered. If the document shows that the mortgagor had mortgaged his property by deposit of title deeds, registration of the document becomes necessary.^{51a}

6. Anomalous Mortgage : Section 58 (g).—Section 58 has laid down several kinds of mortgage. But the classification of mortgage given in this

51a. *Allahabad Bank v. Shinganga Tule Wali*, AIR 2014 Bom 100 (Anwarulhaq Bench).

section is not exhaustive. Besides these forms of mortgage, there are other methods of taking loans on the security of immovable property. These methods although not included in Section 58, but are in practice in India. Such modes of taking loans fulfil the essential requirements of a mortgage but do not come under any category of mortgage given in this section. These transactions are in their very nature a mortgage without any specific name. Since most of such mortgages are either customary or combinations of two or more forms of mortgages and thereby causing anomaly (inconsistency) they are called anomalous mortgage.

Definition.—According to Section 58 (g), a mortgage is anomalous mortgage if it is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or, a mortgage by deposit of title-deeds.

When a transaction is a mortgage in all respects i.e. there is existence of debt and security of an immovable property for re-payment of that debt but the agreement between the debtor and creditor is of such nature that it cannot be included in any specific category of mortgage, the transaction is anomalous mortgage. It may also be combination of any two or more forms of specific categories of mortgage.

Instances of anomalous mortgage.—Some well known examples of anomalous mortgage are given below:—

- (a) **Simple mortgage usufructuary.**—Where terms of mortgage are mixture of a simple mortgage and an usufructuary mortgage, the transaction is simple mortgage usufructuary. This is a special category and is called anomalous mortgage. Where there is a personal covenant with an express or implied right of sale and the mortgagee is given also possession of the property so that he may adjust his loan from the rents and profits of the property or the interest thereof, the mortgage is neither a simple mortgage nor usufructuary mortgage. It is a combination of the two. In a simple mortgage, there is no provision for transfer of possession of mortgage-property; the mortgagee is entitled to recover the mortgage-money personally from the mortgagor. But if parties have agreed that mortgagee will also have possession and right of enjoyment of the property, the situation would create an anomaly (inconsistency) respecting the nature of mortgage. Accordingly, such transaction is called anomalous mortgage. In *Munni Lal v. Phuddi Singh*,⁵² the mortgage-deed provided that in the event of failure on the part of mortgagor to pay up the amount due within the specified period of time, it shall be open to the mortgagee to recover the same by sale of the mortgage-property. The mortgage-deed also provided that mortgagee shall be entitled to realise rents from the shops situated in the mortgage-property. It was held by the Allahabad High Court that despite mortgagee's right to recover his money by sale of property as is the case in simple mortgage, it was not a simple mortgage. The same deed also gave constructive (if not actual) possession, by providing for mortgagee's right to receive rents from certain shops situated in the mortgage-property. The Court held that it was simple mortgage usufructuary which is an anomalous mortgage under Section 58 (g) of the Act.

52. AIR 1967 ALL 155.

Where a deed of mortgage gives a right of possession to the mortgagee and also contains a covenant to pay, the mortgagee has both rights independently. The mortgagee may sue for sale although he may have given up possession. A simple mortgage usufructuary at the first instance may be purely a simple mortgage but the mortgagee may be given the right to take possession in both the rights independently. He may sue for sale of the property or take possession of the property in the event of default.

(b) *Mortgage usufructuary by conditional sale.*—In this form of mortgage, the mortgagee is first entitled to take possession and enjoyment of property but there is also a condition that in default of repayment within a specified period, the mortgagee shall have the right to cause the sale of property. Thus, where the mortgage is usufructuary mortgage for a fixed term and there is also a condition that on expiry of the due date, it shall operate as mortgage by conditional sale, the whole transaction is mixture of usufructuary mortgage and mortgage by conditional sale. It is therefore anomalous mortgage. The anomaly is that a usufructuary mortgage is not for any fixed duration. Fixed duration is essential feature of mortgage by conditional sale. Since both are mixed in one mortgage, it is anomalous mortgage. In *Vaddiparthi v. Appalannasimulu*,⁵³ the mortgage was usufructuary mortgage in which the rents and benefits were agreed to be adjusted against interest. It was also agreed that the principal money shall be repaid in five years and if it is not paid within this period, the mortgage was to work out into a sale at the expiry of twenty years. The Madras High Court held that it was a typical mortgage usufructuary by conditional sale. In a mortgage-deed it was provided that the mortgagee will have the possession of property in lieu of interest and that the debt was to be paid on a certain date. It was also provided that at the end of said specified period, the mortgagee would be entitled to foreclose according to law. It was held that the mortgage was a combination of mortgage by conditional sale with incidents of a usufructuary mortgage.⁵⁴

(c) *Customary forms of anomalous mortgage.*—Customary mortgages are mortgages to which special incidents are attached by local usage.⁵⁵ Certain peculiar mortgages are in practice in the form of local customs. They have the essential features of a mortgage but their terms and conditions are governed by local customary practices. Such customary mortgages are included in the category of anomalous mortgage. For example, *Kanum* and *Olli* mortgages of Malabar are peculiar forms of mortgage because they are not redeemable before expiry of twelve years. *Kanum* mortgage operates as lease as well as usufructuary mortgage. *Pariarilam* mortgage of Malabar is also in the category of anomalous mortgage. In redeeming this mortgage it is the market-value of the mortgage-property which is paid not the amount for which it was mortgaged. *Sau* mortgage is in practice in Gujarat. A peculiar feature of *Sau* mortgage is that a *Sau* mortgagee without possession gets priority over any subsequent *bona fide* purchaser with possession.

⁵³. AIR 1921 Mad. 517.

⁵⁴. *Siti Nelli v. Thekuradas*, (1919) 46 Cal. 448; 52 IC 433.

⁵⁵. Mulla: TRANSFER OF PROPERTY ACT, Ed. VII, p. 392.

Attestation of anomalous mortgage.—An anomalous mortgage is required to be in writing and must also be attested.⁵⁶

59. *Mortgage when to be by assurance.*—Where a principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

SYNOPSIS

- Modes of Completing Mortgages.
- Registration.
- Delivery of possession.
- Deposit of title-deeds.
- Applicability.

MODES OF COMPLETING MORTGAGES

Section 59 makes provision for the formalities which are necessary to complete a mortgage. Transfer by way of mortgage is effective becomes assurance or security only when it has been completed according to the necessary formalities prescribed by law. This section lays down following three modes of completing a mortgage—

- (1) Registration,
- (2) Delivery of possession, and
- (3) Deposit of title-deeds.

1. *Registration.*—Except the mortgage by deposit of title-deeds, all other forms of mortgage must be made through a registered instrument, if the sum assured (debt) is Rs. 100 or more. But, a simple mortgage must always be made through a registered deed irrespective of the amount of debt. A simple mortgage should be effected only by registered document even where the sum assured (i.e. loan taken) is less than Rs. 100.

Where registration is necessary, the mortgage must be in writing, attested by at least two competent persons, signed by mortgagor and duly registered according to provisions of the Registration Act. A simple mortgage (and other mortgages securing Rs. 100 or more) does not become complete and enforceable possession of property under an oral agreement for securing a loan of Rs. 1000 compulsory, has not been duly registered, the registration of which is

⁵⁶. *Kanina Kanup v. Sankara*, AIR 1921 Mad. 243.

unregistered mortgage though does not constitute a valid mortgage, may still be an evidence to prove that debtor has taken loan from the creditor. Further, if a mortgage in which registration is necessary has not been duly registered it cannot be converted into a charge under Section 100 of this Act.

It was held about a unilateral mortgage deed registered in accordance with the requirements of Section 59 that it is immaterial in such a case whether the mortgage was signatory to the deed or not such mortgage is to be given effect to, particularly when it has been acted upon.⁵⁷

2. Delivery of possession.—*Mortgage by conditional sale, usufructuary mortgage and English mortgage* may be effected by delivery of mortgage-optional; it is not compulsory. Mere delivery of possession of the property is sufficient to constitute a valid mortgage. Thus, except simple mortgage and mortgage by deposit of title-deeds, the question whether it may be effected by registration or delivery of possession of property depends upon the 'principal money secured'. 'Principal money secured' is that amount which the debtor takes as loan from the creditor. If the loan is Rs. 100 or more, registration is compulsory. If it is less than Rs. 100, delivery of possession of property is enough. An oral usufructuary mortgage was held invalid where the principal money secured was Rs. 450.⁵⁸

In the case of an oral mortgage under which possession has been given to the mortgagee, it has been held that the mortgagor cannot regain possession on the basis of the oral mortgage, as it cannot be proved in court for want of registration. But it would be open to him to recover possession on the strength of his title.⁵⁹

Principal money secured.—Principal money secured means actual loan taken by the debtor; it does not include interest or other benefits. Interest or any other addition is not taken into account in calculating the value of the document for the requirement for registration.⁵⁹ In *Jodi Ram v. Lajja Ram*,⁶⁰ a bond provided that the sum of Rs. 90 was due and the mortgagee had agreed to pay that sum in 18 years by six-monthly instalments of Rs. 5 carrying some interest. It was also provided that in case of default the mortgagor was liable for payment of the whole sum of Rs. 180 plus the interest. It was held that the principal money secured by the mortgage was Rs. 90 and registration of the deed was not necessary.

3. Deposit of title-deeds.—Mortgage by deposit of title-deeds does not require registration. It is an oral transaction and mere delivery of the title-deeds of immovable property completes a valid mortgage. As discussed earlier, sometimes deposit of title-deeds is accompanied by a memorandum which is in writing. Normally, such memorandum states only the fact of deposit of title-deeds. But the parties may also agree that the memorandum as such would constitute borrowing transaction: Where the parties have agreed that

memorandum in the deposit of title-deeds is to operate as document of bargain, the memorandum must be registered.⁶¹

Applicability.—Section 59 has been extended to apply to the State of Punjab with effect from June 6, 1968. In Haryana, this section has been made applicable with effect from August 5, 1967. The result is that now in these States mortgages other than a mortgage by deposit of title-deeds may be made only through a registered instrument if the money secured is Rs. 100 or more. Simple mortgage must be effected only by a registered deed.

59-A. References to mortgagors and mortgagees to include persons deriving title from them.—Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgages shall be deemed to include references to persons deriving title from them respectively.

This section was incorporated in this Act by the Amending Act of 1929 to make it clear that the words 'mortgagor' and 'mortgagee' include persons deriving title from them. According to Section 59-A, the term 'mortgagor' includes persons succeeding a mortgagor by inheritance or under a Will or by sale or by Court-sale. In view of this section, the word 'mortgagor' as used in Section 61 (1) (c) includes also a subsequent purchaser of the mortgaged property. For purposes of Section 59-A the transfer may either be voluntary transfer or an involuntary transfer, for example, Court-sale.⁶²

Similarly, in view of this section, the word 'mortgagee' in Sections 60 and 62 is intended to mean not only mortgagee but all persons who derive title from him.

Rights and Liabilities of Mortgagor

60. Right of mortgagor to redeem.—At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

57. *Tanichand v. Sagarbhai*, AIR 2007 SC 2039.

58. *Rampirsad v. Kalayn*, AIR 1973 Raj. 208.

58a. *Jee Ram v. Ganga Prasad*, AIR 2010 NOC 834 (P & H).

59. *Habibullah v. Muneekad*, (1883) 5 All 447; *Kothumuri v. Padali*, 5 Mad. 119.

60. (1913) 11 All 729 : 21 IC 78.

61. *Rachpal Malhotra v. Bhagwanidas*, AIR 1950 SC 272.

62. *G. R. Rao v. K. Kanchangra*, (1975) 2 Andh. WR 408.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.—Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part, the share of a mortgagor.

SYNOPSIS

- Right of Redemption.
- What is Right of Redemption?
- Equity of Redemption.
- Once a mortgage always a mortgage.
- Multiple mortgages.
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RIGHT OF REDEMPTION

What is Right of Redemption?—Right to redeem is the right to recover something by making certain payments. Mortgagor's right of redemption means mortgagor's right to recover or get back the property after making payment of loan. Mortgage is a transfer of an interest in immovable property for securing the loan. By way of security, the mortgagor transfers an interest in his immovable property. If the loan has been paid, the interest so transferred must revert back to the mortgagor. The mortgagee cannot retain any interest in the mortgage-property if debt does not exist. By making payment of the loan with its interest the mortgagor becomes entitled to redeem i.e. call back the 'interest' given to mortgagee as security for repayment. Mortgagor's right to redeem the mortgage-property after repayment of loan is a right which rests in him by virtue of his residuary ownership in the property. It may be noted that immovable property is bundle of several interests. Out of all such interests only 'an interest' is transferred to mortgagee as security for repayment of loan. After creating an interest in favour of mortgagee, the mortgagor still has the remaining interest. This remaining interest is called residuary ownership. Basis of mortgagor's right of redemption is his residuary ownership in the mortgage-property.⁶³

Mortgage is effected only for giving security for repayment of loan. Mortgagor neither intends nor desires that property should go absolutely to mortgagee. Therefore, if mortgagor could not repay the loan on a fixed date and there is some delay, the law must extend his right of redemption upto a reasonable time. It would be unfair and also against the very object of the transaction of mortgage that mortgagor's right of ownership is lost merely due to non-payment of loan within specified period. Principles of equity, justice and good conscience would not allow that a transaction which is basically a borrowing transaction should become an absolute conveyance only because there was no repayment on a fixed date. Mortgagor's right of redemption has been incorporated in Section 60 of this Act. It is, therefore, a legal or statutory right in India. This is an inherent right of every mortgagor irrespective of the kind of mortgage. However, the right of redemption as laid down in Section 60 of this Act is based on the equity of redemption under English law.

In a case under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Supreme Court stated, in reference to sale or transfer of the secured asset under the Act that the principles incorporated in Section 60, Transfer of Property Act, are in essence general in nature in respect of all mortgages and therefore applicable in

63. The mortgagor's right of redemption co-exists with mortgagee's right of foreclosure or sale in default of repayment of loan on due date. If mortgagor's right in property is protected by his right of redemption, mortgagee's right to take back his money is also protected by his right of these two inconsistent rights. Under the law, a reasonable balance has been maintained between (Pall), a suit for redemption of mortgage cannot be converted into a suit for title. An issue of paramount title cannot be gone into in a redemption suit.

respect of secured interest in the secured asset created in favour of a secured creditor.^{63a}

Equity of Redemption.—In England, the mortgagor's right of redemption was introduced by the Chancery Courts. Chancery Courts were the Courts of Equity. Therefore, mortgagor's right to redeem the mortgage by making payments even after the due date is known as equity of redemption. The Equity Courts introduced this right in order to do justice with cases on mortgage decided under the common law. At common law, mortgage was transfer of legal estate (absolute interest) subject to a condition. The condition was non-payment of debt on the fixed date. The result was that if this condition i.e. non-payment of debt upto fixed date was fulfilled, the mortgage-property belonged absolutely to mortgagee. Common law treated non-payment upto specified time as penalty for the mortgagor. In default of repayment of loan the mortgagor lost all his rights in the property because no further relaxation was given under common law even if he was ready to repay the debt after sometime. The common law gave no relief to those mortgagors who failed to repay the loan within fixed date. Sometimes the money-lenders themselves used to cause delay in repayment by mortgagor and used to avoid accepting the money within the due date. This was done by them to exploit the provision of common law as well as the financial hardship of the debtors. They knew that if somehow the loan with interest remained unpaid upto fixed date, they would become owner of property in lieu of the small sum of money which debtor took in his urgent need and extreme helplessness. A great injustice was, therefore, being done to the mortgagors at common law. Equity came to their rescue.

The Courts of Equity realised that the main purpose of effecting a mortgage was to give security to the money-lender for repayment of his money. Therefore, the money-lender should not be given any legal right to hold on the property absolutely if mortgagor was ready to play within reasonable time after expiry of the due date. The right which was denied by common law was given to mortgagor be equity. And, this right of mortgagor to redeem even after he was in default, was known as *equity of redemption*. Equity of redemption, therefore, operated against common law. The common law provided that if mortgagor defaulted in paying off the debt with interest within stipulated time, the mortgagee would become absolute owner of property. But, as against this, equity provided that even after the expiry of the date fixed for repayment, the mortgagor shall have the right to redeem the mortgage at any time before foreclosure or sale by the mortgagee. Thus, equity started with the notion that stipulation as to time (i.e. fixed date for repayment) should not be treated as penalty or punishment and that if mortgagor was willing to repay within reasonable time, he must be given that opportunity.⁶⁴ The English Equity Courts laid so much emphasis upon mortgagor's right of redemption that they held that it was an essential characteristic of every mortgage. The Courts of Equity

63a. *Mulheau Varghese v. M. Annitha Kumar*, AIR 2015 SC 50.

64. However, equity while protecting the interest of mortgagor, protected also the interest of mortgagee. Beyond a reasonable time, the mortgagor lost his equity of redemption. After such time, mortgagee was entitled to get decree for foreclosure by the Court of Equity.

provided further that it was such an important right of mortgagor that it could not be denied to him in any manner, not even by express agreement of the parties themselves. Equity declared that 'once a mortgage, always a mortgage'.

Once a mortgage always a mortgage.—Equity of redemption was introduced by the Chancery Courts in England to give relief to those mortgagors who could not repay the loan within stipulated time. The main purpose of developing the doctrine of redemption was to protect the interests of mortgagors who in default of repayment of loan had to lose all rights in their properties. But, the mortgagee (money-lender) by taking advantage of the depressed position of debtor at the time of taking loan could very easily make an agreement that he (mortgagor) would not exercise the right of redemption after expiry of the due date. Thus, by an express contract entered into between mortgagor and mortgagee, the mortgagor could be deprived of his right of redemption which equity provided him against the strict provisions of common law. To overcome such situations, the equity had to go a step further by declaring that : *once a mortgage, always a mortgage and nothing but a mortgage*. In essence it provided that mortgagor's right of redemption would not be defeated by any agreement to the contrary even though mortgagor himself had agreed to it. The maxim 'once a mortgage always a mortgage' simply means that a transaction which at one time is mortgage could not cease to be so by having any stipulation in the mortgage-deed calculated to prevent the right of redemption. In other words, the well-known rule that agreement of the parties overrides the law, does not apply to mortgages.⁶⁵ Accordingly, it was established in equity that no contract between mortgagor and mortgagee which was entered into at the time of mortgage was valid if it prevented mortgagor's right of calling back his property on repayment of the loan. The underlying principle of this maxim that once a mortgage always a mortgage was stated by Lord Henley in the following words :

"This Court as Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance made absolute. And there is great reason and justice in this rule for necessitous men are not, truly speaking, free men, but to answer present exigency, will submit to any terms that the crafty may impose upon them."⁶⁶

The maxim, "once a mortgage, always a mortgage" may be applied to explain following two situations :

(1) *First*, where a transaction is intended by the parties to be a borrowing transaction under a mortgage, though it is carried out in the form of a

65. Section 60 of the Transfer of Property Act does not contain such words as "in the absence of any contract to the contrary" because right of redemption under this section cannot be taken away by any contract to the contrary entered into by the parties to mortgage.

66. *Vernon v. Bethell*, (1762) 1 Eden 113; cited in *Mulla's TRANSFER OF PROPERTY ACT*, Ed. VII, p. 404.

sale, equity will not allow the mortgagor to be deprived of his right of redemption. That is to say, where in essence a transaction is mortgage but may be given the form of sale, its nature of mortgage cannot be converted to that of a sale merely because of any stipulation in the mortgage-deed that after expiry of due date mortgagor has no right to redeem and the property shall belong to mortgagee. A mortgage is always considered as redeemable even though there is an express agreement between the parties that it cannot be redeemed after the due date.

(ii) Secondly, equity does not permit any clog on redemption. A clog on redemption means any stipulation or provision in the mortgage-deed which restricts the mortgagor's right of redemption. Any contract or agreement or provision incorporated in the mortgage to prevent mortgagor's right of calling back the property on payment of loan is a 'clog' on the equity of redemption. A 'clog' on redemption is void. A stipulation which amounts to a 'clog' on redemption is void and cannot be enforced as being contrary to the very nature of mortgage.

This maxim was applied by the Full Bench of the Punjab and Haryana High Court in *Ram Kishan v. Shro Ram*.⁶⁷ The question was that of the right to such redemption of a usufructuary mortgage. No time limit was fixed for the purpose. The court said that the right to seek redemption does not arise on the date of mortgage. It arises on the date when the mortgagor pays or deposits in court the mortgage money or the balance amount. The principle that once a mortgage always a mortgage and therefore always redeemable becomes applicable. The mortgagee remains in possession of the mortgaged property. He enjoys its usufruct. He loses nothing by returning the security on receiving payment of the mortgage debt. The limitation of 30 years under Article 61 (a) of the Limitation Act, 1963 begins to run when the right to redeem or to seek possession accrues.

In a case before the Supreme Court the mortgagee was not allowed to claim the status of lessee. The plaintiff's predecessor had created a mortgage. The plaintiff filed a suit for redemption and re-conveyance. The mortgagee pleaded that the defendant had by their conduct agreed to treat the transaction as lease. The defendant was in possession as a mortgagee. He could not prove his possession as a tenant. The Court said that his status could not be changed from mortgagee to lessee by any document or deed which was not registered and much less by conduct. The plaintiff was entitled to decree.⁶⁸

Multiple mortgages.—Where the mortgagors redeemed the first mortgage from a part of the proceeds of the second mortgage and this fact was recorded in the registered mortgage deed with the endorsement in second

67. AIR 2008 P & H 77 (FB).
68. *Chandokant Shambhoo Mohale v. Parvati Bhairav Mohale*, AIR 2008 SC 3733. See to the effect the decision in *Hortons v. On Prudant*, AIR 2005 SC 686, *Gardner Kaur v. Hiranjan Singh*, AIR 2008 NOC 2174 (P & H), no time limit for redemption of usufructuary mortgage, mortgagor's right to seek redemption at any time, the mortgagee in possession could not be declared to be the owner by efflux of time, *Tara Singh v. Amrik Singh*, AIR 2003 NOC 2175 (P & H), mortgagor could have right to seek redemption at any time by tender of dues.

mortgage deed itself, it was held in such a case it was not necessary to implead the first mortgagees.⁶⁹

CLOG ON REDEMPTION

Clog on redemption means condition or stipulation which prevents the mortgagor from redeeming the mortgage-property on payment of the loan. Right of redemption in England is known as mortgagor's equity of redemption. Equity does not permit any fetters or 'clog' on mortgagor's right of redemption and holds that 'once a mortgage, always a mortgage'. A clog on equity of redemption is void. In India, the mortgagor's right of redemption as laid down in Section 60 of this Act, is a statutory right. However, as discussed earlier, the right of redemption in India is based on English equity of redemption. In India too, a 'clog' on mortgagor's right of redemption is void because no condition or stipulation can prevail against the statutory right given by Section 60. This section has not used the words 'in the absence of any contract to the contrary'. This means to suggest that any contract by mutual agreement between the parties which is against its provisions has not been contemplated by Section 60 and cannot be regarded as valid. Moreover, the Courts too have accepted that the doctrine of clog on equity of redemption being a rule of justice and good conscience, it must be given recognition. Accordingly, a clog on mortgagor's right of redemption is void as being against the provisions of Section 60 as well as violative of the principles of equity. The result is that even mortgagor cannot stipulate against his own right of redemption. If he does so, it may be void as being a 'clog' on his right of redemption. However, a condition or stipulation is a 'clog', and thereby void, only in the following circumstances—

- (i) The condition or stipulation has been imposed only by the mortgagor, not by any other person who is stranger to transaction.
- (ii) The condition or stipulation must be incorporated in the mortgage-deed itself. Parties are free to stipulate otherwise by any independent contract outside the mortgage-deed.
- (iii) The condition or stipulation included in the deed must be unreasonable, against public policy and with *malafide* intention.
- (iv) The condition or stipulation puts either absolute restraint on mortgagor's right of redemption or prevents him from redeeming the mortgage for unreasonably long period.

What condition or stipulation may amount to be a 'clog' on mortgagor's right of redemption, is a matter of fact. It depends on the facts of each case and upon the nature of condition or stipulation. Some of the instances of 'clog' of right of redemption are given below:

Instances of Clog on redemption

(1) **Condition of Sale in default.**—A condition which makes mortgage a sale in default is clog on redemption. Stipulation entered into at the time of mortgage and included in the deed that in default of repayment of loan within the fixed date, the mortgagee shall be deemed to be purchaser of the mortgage-

69. *Mohinder Singh v. State of Punjab*, (2007) 10 SCC 724.

property is a 'clog' on redemption. Such stipulation converts mortgage into a sale. It is therefore void. Since right of redemption basically an equitable right and since equity disfavours a mortgage being converted to sale in default of payment, any such condition or stipulation is void. Therefore, where the terms of a mortgage-deed provide that if mortgagor fails to repay the loan within a specified period the mortgagee shall become owner of the property, the stipulation being 'clog' shall not be given effect. Such terms and conditions take away mortgagor's right of redemption for ever, they are not permissible at law. In *Gulab Chand Sharma v. Saraswati Devi*⁷⁰ there was a mortgage by conditional sale. The mortgagee was given a time of four years for repayment of the loan. The mortgage-property was on lease. The deed provided that in case the mortgagee received any notice from any public authority for breach of covenants of lease within four years term, the mortgagee shall become owner of the property. The Supreme Court held that this stipulation in the mortgage-deed was a clog on mortgagor's right of redemption and as such it could not be enforced. Similarly, where a document contained an agreement that if the mortgagor could not pay the amount on due date the document is to be treated as sale, the agreement was held to be a clog on equity of redemption and the document was treated as mortgage-deed.

An agreement in a mortgage-deed that in default of payment of debt on due date, the mortgagor will sell the property to mortgagee at a price to be fixed by umpires was held a clog on the equity of redemption and was, therefore, not enforceable.⁷¹ Any agreement which converts mortgage into a sale in default of repayment of loan on the due date is, therefore, void and cannot take effect.

Subsequent Sale.—The rule is that a mortgagee while lending money cannot take security with a condition which has the effect of converting a mortgage into sale in his favour. But after execution of the mortgage-deed the mortgagee may stipulate independently for the purchase of the mortgage property. An agreement for sale is a clog if it is part and parcel of the mortgage-deed. But there is nothing in law to prevent the parties from entering into a contract which qualifies the right of redemption.

(2) **Postponement of redemption for long term.**—The postponement of right of redemption for a long period is not necessarily a clog on redemption. This is so because in certain cases postponement of the right of redemption for a long term may be convenient for both the parties. It may be convenient for the mortgagor who will not have to search out another creditor. It may suit mortgagee as being a long term investment with an increasing interest. Accordingly, a mere long period for redemption may not necessarily or *per se* amount a clog on redemption unless it is shown from the facts and circumstances that mortgagee had taken undue advantage of his position as money-lender.⁷²

Whether postponement of redemption for a long term amounts to clog or not depends on the fact whether it is unreasonable or not. If a long term is unreasonable it is clog; if it is not so it is not a clog. The postponement is

unreasonable if the bargain is oppressive or unconscionable. But, this all depends on the facts and circumstances in each case. However, besides other facts, the amount advanced, the nature of security offered by the mortgagor, the terms and conditions on which the money was advanced and the circumstances in which the mortgagor was compelled to borrow money are also to be taken into account. The Courts have upheld long terms in cases it was found reasonable beyond any doubt. In *Seth Ganga Dhar v. Shankar Lal*⁷³ the Supreme Court held that postponement of redemption for 85 years was not a clog on right of redemption under the circumstances of the case because it was not unreasonable. The Court observed:

"The Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the money on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief. We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for 85 years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now, this question is essentially one of fact and has to be decided on the circumstances of each case."

But, postponement of redemption for 200 years was held a clog as being unreasonable postponement of mortgagor's right of redemption.⁷⁴ In usufructuary mortgages, the mortgagee holds possession of the property and the rents and profits are adjusted against the interest. Therefore, normally the period of redemption of mortgage is long. It suits both the parties. So, in the absence of any circumstance suggesting oppression or undue influence, period of 50 years was not a clog. Similarly, in a usufructuary mortgage, a covenant provided possession of the property for 51 years, together with a high rate of interest. It also provided that expenses of the repairs are to be added to principal money. The Court held that the covenant was not a clog on redemption.⁷⁵ But in a usufructuary mortgage the condition that mortgagor can redeem the mortgage after 60 years on a particular day was held as 'clog' on redemption.⁷⁶ Here, the condition was void as being a clog not because of long term of redemption but because it provided that mortgage after such long duration could be redeemed only on a particular day and on no other day. In *Sitinder Singh v. Sucha Singh*,⁷⁷ a substantial portion of land was mortgage for securing a very small sum of money. Redemption of the mortgage was stipulated to be after ninety-nine years. Facts on record suggested that the mortgagee was in an advantageous position *qua* the mortgagor. It was also found that the mortgagee had been getting the benefits of the mortgaged land for a period of 26 years at the time of filing of the suit on payment of a meagre sum (rupees 7000) to the mortgagor. The Supreme Court held that keeping in view the facts and circumstances of the

70. A.I.R. 1977 S.C. 242.

71. *Kanaram v. Kailashy*, (1898) 21 Mad. 110.

72. *Chaturbhai Valdas v. Bai Jui*, A.I.R. 1973 Cuj. 93.

73. A.I.R. 2000 S.C. 770.

74. *Fateh Mahomed v. Ram Dayal*, A.I.R. 1927 Oudh. 224.

75. *Sitish Abdur Rahman v. Ram Prasad Nath*, A.I.R. 1945 Oudh. 113.

76. *Bhullam v. Banchela*, A.I.R. 1931 All. 390.

77. A.I.R. 2000 S.C. 1935.

case and also the financial position of the mortgagor at the time of execution of mortgage-deed (in 1968), the stipulation for redemption after 99 years was a clog on the mortgagor's equity of redemption.

Whether a particular period of redemption of mortgage amounts to a clog because it is unreasonably long, depends ultimately on the circumstances in which the mortgagor was compelled to secure the loan, terms and conditions on which the money was advanced and other alternatives to which the mortgagor could have taken. In deciding whether the period of redemption is long-term and therefore 'clog' or not, the present inflationary market in fast moving conditions are also to be taken into account by the Courts.⁷⁸

(3) *Condition postponing redemption in default on a certain date.*—The condition or stipulation which postpones the mortgagor's right of redemption in case of default in payment on a certain date, is regarded as a 'clog' on redemption. Stipulation postponing further the mortgagor's right of redemption is a clog because it bars or restricts the redemption. In *Mohammad Sher Khan v. Seth Swami Dayal*,⁷⁹ the mortgage was for a term of five years. There was a stipulation in the deed according to which if mortgagor could not pay the money the mortgagee was entitled to take possession of the mortgage-property. The stipulation further provided that mortgagee shall remain in possession for twelve years during which the mortgagor cannot redeem the mortgage. It was held by the Privy Council that the stipulation was a clog on mortgagor's right of redemption because it hindered (restricted) an existing right of redemption. The stipulation was, therefore, held void and not enforceable. It is to be noted that right to redeem the mortgage-money becomes exercisable by mortgagor just from the date on which the mortgage-money becomes payable. Accordingly, any stipulation postponing the right of redemption beyond this period bars mortgagor's right of redemption and is a clog. Thus, a condition that if mortgagor fails to redeem the mortgage within the specified time, the mortgage shall be renewed for a further period of forty years was held a clog on equity of redemption.⁸⁰

(4) *Restraint on Alienation.*—A condition which restrains the mortgagor from transferring mortgage-property, is a clog. In mortgage, the mortgagor transfers only 'an interest' of the mortgage-property. After transferring this interest he still has the residuary ownership of that property. So, during mortgage, the mortgagor continues to be the owner of property and he has every right to transfer the property by sale, gift, etc. and can even effect another mortgage of that property. Any stipulation which curtails or takes away mortgagor's right of subsequent disposition is a clog on equity of redemption. It is void and cannot be enforced by the Courts. A stipulation that mortgagor cannot take loan from any other creditor by mortgaging the property again, is a dog because it is a restraint on his power of alienation.⁸¹

78. *Pomal Kanji Gopinji v. Vrijlal Karamdas Purohit*, AIR 1989 S.C. 436.

79. AIR 1922 P.C. 17.

80. *Sudhakar v. Bijai Singh*, (1914) 36 All. 551; 24 L.C. 705.
81. *Ran Sohan v. Amrita*, (1880) 3 All. 369; *Kripal Singh v. Slicombhar*, AIR 1930 All. 283; *Nannalham v. Chinnu*, AIR 2012 Mad. 210. Condition imposed against selling of mortgaged property in default to redeem the same within the stipulated time was held to be clog.

Right of pre-emption in favour of mortgagee.—Sale of property by the mortgagor to a third party despite the fact that there was provision for right-of pre-emption in favour of the mortgagee was held to be valid. The Court said that the right of pre-emption would operate as a clog or the right of redemption of the transferee-in-interest of the mortgagor.⁸²

(5) *Collateral benefits to mortgagee.*—Collateral benefits to mortgagee are not necessarily clog on redemption. Under a mortgage, the mortgagee is entitled to get back his money together with interest at usual rate. In a usufructuary mortgage, the mortgagee has right of possession and taking rents and benefits of the property which he adjusts against interest. These benefits are inherent benefits of a mortgagee. Such benefits are not collateral benefits. Collateral benefits are those benefits or advantages which are given to a mortgagee in addition to above-mentioned benefits. That is to say, an advantage which is in addition to mortgage-money with interest, is a collateral benefit.

A collateral benefit to mortgagee is not necessarily a clog on equity of redemption. Whether such additional benefit amounts to clog or not, depends on the facts and circumstances in each case. In order that collateral benefits to mortgagee may be 'clog' on redemption it is necessary that:

- (a) the collateral benefits given to the mortgagee are unfair and unconscionable, and
- (b) the collateral benefits to mortgagee are part of the transaction of mortgage; not an independent benefit.

Thus, where the stipulation in the mortgage-deed provides some collateral advantage to mortgagee which is an oppressive bargain or an "advantage exacted from man under grievous necessity and want of money", the stipulation is a clog. But, where the additional advantage is neither oppressive nor in any way against the equity of redemption, the stipulation is valid and can be given effect. Further, it is also necessary that the additional advantage conferred on the mortgagee is a part of the same transaction which constitutes mortgage. If the benefits conferred are independent of the borrowing transaction, there is no clog on the equity of redemption.

In England, law on this point has passed through several stages before it was settled in *Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.*⁸³ In this case, the House of Lords has laid down specific rules for ascertaining whether a benefit conferred on the mortgagee amounts to clog on equity of redemption or not. Briefly, the facts and the law laid down in this case are given below.

Kreglinger v. New Patagonia Meat & Cold Storage Company Ltd. (1914)

Facts.—The New Patagonia Co., which was doing the business of cold storage of meat and sheep skins, took a loan of £ 10,000 from a firm of wool brokers. The New Patagonia Co. executed a mortgage in favour of the firm.

82. *Haslind & Sons v. P. Tej Raj Shumra*, AIR 2007 SC 3246.
83. (1914) A.C. 25.

Mortgage-deed provided that New Patagonia Co. (mortgagor) could make payment of the loan at any time by giving one month's notice to the Firm (mortgagee). It was also agreed under the mortgage that New Patagonia Co. would not sell the sheep skins to any person other than the Firm for a period of five years from the date of taking of the loan. The New Patagonia Co. (mortgagor) paid the whole amount to the Firm (mortgagee) within two and half years from the date of taking of loan. The question arose, whether the New Patagonia Co. was bound to sell the sheep skins to the firm for five years as agreed even though the debt was paid earlier or, whether the agreement was void as a clog on equity of redemption?

Held.—The House of Lords held that the agreement was not a clog on equity of redemption. The agreement was valid and enforceable, notwithstanding that the loan was paid off. Their Lordships observed that there was no rule in equity which prevented a mortgagee from stipulating for any collateral advantage. A collateral advantage was held to be clog only if:

- (a) it was unfair and unconscionable, or
- (b) it was in the nature of a penalty clogging the equity of redemption, or
- (c) it was inconsistent with the legal or equitable right to redeem.

Although the principles laid down in this case have been accepted, the decision in general has not been followed by the Indian Courts. In India an agreement under which a collateral advantage to mortgagee extends beyond the period of redemption has been held clog on equity of redemption.⁸⁴ A condition that mortgagee is entitled to continue possession of the mortgage-property even after redemption is a clog. In *Govind Ram v. Rajpal Singh*,⁸⁵ the agreement in the mortgage provided that after redemption the mortgagee was entitled to the mortgage possession of the property as permanent tenant. The Punjab & Haryana High Court held that the agreement was a clog on equity of redemption, although the mortgagor was not in any difficult or embarrassed situation. But where the agreement provided that the mortgagee in possession could charge a fixed sum of money annually for repairs and other contingent charges, the Privy Council held that the agreement was not a clog on redemption.⁸⁶ It appears, that in India the Courts have taken a view that an agreement or stipulation which confers collateral advantage to mortgagee beyond the period of redemption is a clog. But a collateral advantage not extending beyond this period may be valid and not against public policy.⁸⁷

(6) Penalty in case of default.—An agreement which amounts to penalty in case of non-payment of debt is a clog on redemption. Such agreement cannot be given effect. Accordingly, any stipulation which may be oppressive or, by way

84. It is submitted that in India the Courts have preferred the observations of Lord MacNaughten in *Nobles v. Rice* (1902), A.C. 24 where he held: "It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that after full payment of principal, interest and costs he should continue to receive for a definite or an indefinite period a share of the rents and profits of the mortgaged property as a result of an obligation arising from a contract made when the mortgage was created."

85. A.I.R. 1973 P & H, 94.

86. *Chaitram Venkatarangin v. Zamindar of Tuni*, A.I.R. 1923 P.C. 26.

87. *Bimal Jati v. Bimalji* (1900) 22 All. 238; *Harris Pat v. Jahnurathi*, (1897) 2 Cal. W.N. 575.

of punishment to mortgagor if he fails to pay the loan on due date, is invalid as being clog on equity of redemption. In *Sarfari Singh v. Udwat Singh*,⁸⁸ the stipulation in a mortgage provided that in case of default in payment of loan on due date, the mortgagor was liable to pay one *murra* of rice for every one rupee of debt. The Odish Chief Court held that the stipulation was clog as being so unreasonable that it amounted to penalty in default. Whether the terms and conditions are penalty or merely enhanced interest, is to be ascertained by the courts on the basis of facts and surrounding circumstances. Stipulation which provides merely for an enhanced rate of interest in case of non-payment of debt on due date, is not a clog on equity of redemption. But, where the interest is already a compound interest (enhanced) rate of interest and the stipulation provides for still higher interest in default of payment, the stipulation is penalty and therefore a clog.⁸⁹ It cannot be enforced, against the mortgagor.

However, in the preceding lines, only some of the important instances of clog on redemption have been given. Besides these, there might be other situations in which stipulations may amount to clog on redemption. For example, a covenant to grant permanent lease to mortgagee is a clog on equity of redemption. Similarly, a stipulation that mortgagee alone can ask for payment of the mortgage-money and that the mortgagor would not be entitled to ask redemption, was held a clog on equity of redemption.⁹⁰ A stipulation in the mortgage which provided that mortgagor shall continue to pay interest (even if he wanted to redeem) till the widow died was held a clog on redemption.⁹¹

EXERCISE OF RIGHT OF REDEMPTION

Mortgagor may exercise his right of redemption in any of the following manners—

- (a) By paying or tendering the mortgage-money to the mortgagee.
- (b) By depositing the mortgage-money in the Court.
- (c) By filing a suit for redemption.

(a) Payment or tender of mortgage-money.—The mortgage-money (debt) may be paid directly to mortgagee (money-lender). Payment may be made also to his authorized agent. Unless the mortgagor makes payment or tenders to make payment of the debt, he cannot redeem the mortgage. Tender means making unconditional offer for the payment of debt in such manner that mortgagee gets the money. Before mortgagor claims redemption, he must either pay the money to mortgagee or tenders to pay the same.

To whom payment is to be made?—The mortgagor may pay the money to mortgagee or to his authorized agent. Payment made to an agent who disclaims authority to receive the mortgage-money on behalf of mortgagee, is not regarded as payment of debt. Similarly where mortgagor knows that a

88. A.I.R. 1929 Oudh. 30.

89. *Sunder Koor v. Shant Krishna*, (1906) 34 Cal. 150, 34 L.A. 9.

90. *Valiyathilham v. Jannapurkasa*, A.I.R. 1953 Tr. Coch 570.

91. *Sarna v. Manikam*, A.I.R. 1949 Mad. 768.

person is not a duly appointed agent or ceases to be an authorized agent of mortgagee, payment made to such person does not discharge the debt. Where the mortgagee is minor, payment or tender must be made to his lawful guardian. In the absence of any lawful guardian, the mortgagee must apply to the Court for appointing a guardian *ad litem* for purposes of accepting the debt.

Where there are two or more joint-mortgagees, the payment must be made to all of them jointly. In such cases payment of mortgage-money made to only one mortgagee does not discharge the debt against the remaining mortgagees. For example if A takes a loan of Rs. 30,000 from X, Y and Z under a mortgage and all the three mortgagees have contributed jointly, then payment of the whole money (Rs. 30,000) plus interest, to X alone does not discharge the debt due to Y and Z. In other words, payment to one mortgagee does not liberate the debtor against all the creditors.⁹² In England too, the law is the same. "Although the mortgagees take a joint security, each means to lend his own money, and takes back his own."⁹³

When the mortgagee dies, the payment is to be made to his legal heir. Where the mortgagee dies leaving two or more legal heirs who are jointly entitled to his estate, payment must be made with the concurrence of all. However, where they have constituted one of their member as *karta* or manager of the joint property of the deceased mortgagee, the payment made to such *karta* or manager is a valid discharge against all heirs.⁹⁴

Mode of payment.—Payment must be made in the coins or currency notes of the country. Normally a tender (offer) of the payment of debt is to be made with actual production of the amount in the current coins or currency notes. If the debtor sends a cheque without any authority or request by the creditor that the amount should be remitted in that manner, the creditor (mortgagee) is not bound to accept it in payment.⁹⁵ However, the parties may agree to any other mode of payment of debt. For example the mortgagee may accept some property of the debtor in lieu of payment of the mortgage-money. But in such cases, the transfer of property by mortgagee to mortgagee must be made lawfully i.e. through registered document, if required, so that title may pass on to mortgagee.

Where no stipulation has been made between mortgagor and mortgagee regarding the payment of loan in instalments, the mortgagee is entitled to refuse to accept the mortgage-money in instalments and can claim the whole amount at one time.⁹⁶

Payment at proper time and place.—Under Section 60 of the Act, the mortgagor has a right to redeem the mortgage at any time after the principal money has become due. Therefore, the proper time for making payment or tender

is any time after the principal money has become due. Such time is stipulated and mentioned in the mortgage deed. Payment or tender must be made at any time during working hours on the day fixed for payment.

Normally, the proper place for payment of the money is the creditor's (mortgagee's) place. But the parties may agree to any other place for payment or tender. In such case, the payment must be made at the place where it was agreed to be paid. Where no specific contract exists as to the place of payment, it is the debtor's duty to find out the creditor and to make payment where the creditor is. The creditor cannot be compelled to go to any place at the choice of debtor.⁹⁷

Where in the case of a usufructuary mortgage no time was fixed for repayment of the mortgage money, it was held by a Full Bench of the H. P. High Court that the limitation period for redemption of the mortgage was 30 years as prescribed by Article 60 of the Limitation Act, 1963.^{97a}

Where the property has been put to sale by auction and the sale has been confirmed by the Court by issuing a sale certificate, the right of redemption becomes lost.^{97b}

(b) **Deposit of mortgage-money in Court.**—The second mode of redemption is deposit of mortgage-money in the Court. Mortgage-money means capital money (amount of loan) plus interest on the capital money calculated till the date of deposit. Unless the whole of mortgage-money is deposited in the Court, there is no valid discharge. When the mortgage-money is deposited in the Court, the Court shall cause a notice to mortgagee that such a deposit has been made. Where mortgagee is not living in the district in which the property is situated, the notice served on his agent, if any, shall be deemed to be served on mortgagee. Where the notice has duly been served on the mortgagee, it is deemed that mortgagor has done every thing on his part for enabling the mortgagor to withdraw the money from the Court in full satisfaction of the debt.

Mortgagor may deposit the mortgage-money direct in the Court instead of making payment to the mortgagee. Or, he may make a tender (offer), first and after such tender being refused by mortgagee, deposit the amount in the Court. If done it in full discharge of the debt.

(c) **Suit for redemption.**—The mortgagor has a right to redeem the mortgage either by making payment to mortgagee or by depositing the money in the Court. If he does not want to redeem the mortgage by any of these two methods, law. That is to say, a mortgagor is at liberty to redeem the mortgage in a Court of filing a suit for redemption. The suit must be filed by mortgagor directly by right of redemption accrues to him i.e. after the payment of principal money

92. *Hossainian v. Kollinmussen*, (1911) 38 Cal. 342; *Alburt v. Muthlangi*, A.I.R. 1943 Mad. 271; *Jadhvi v. Canjo*, 41 All. 631.

93. *Steds v. Steds*, (1889) 22 Q.B.D. 537 cited in *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XIII, p. 547.

94. *Silaram v. Stridhar*, (1903) 22 Bom. 292.

95. *Krishna Prasad v. Betti Ram*, (1902) 24 All. 85.

96. *Bhawan Lal v. Ram Chulani*, (1902) 24 All. 461.

97. *Molli v. Surajmal*, 30 Bom. 167.

97a. *Bhandaru Ram v. Raitan Lal*, AIR 2012 H. P. 1 (FB), overruling *Jalnal v. State of H.P.*, AIR 2010 H. P. 7.

97b. Now see the Supreme Court decision in *Singh Ram v. Sileo Ram*, A.I.R. 2014 SC 3447 which holds that the period of 30 years starts running from the date of payment and not from the date of mortgage; *Pokshi Chand v. Anwar Singh*, AIR 2011 H.P. 21 which had taken the view that there is no period of limitation in the case of such a mortgage.

97b. *Bishnu Devi Shaw v. Federal Bank of India*, A.I.R. 2014 Cal 90.

has become due. Further, the suit must be filed during the subsistence of mortgagor's right of redemption. Suit must not be filed when mortgagor has already lost his right of redemption. The mortgagor's right of redemption is lost by foreclosure or sale by mortgagee (Sections 67 and 68) or, when it is barred by limitation under the Indian Limitation Act, 1963. In a case before the Supreme Court a financial corporation exercised the right to sell the property of the defaulting debtor. It also accepted the offer of the prospective purchaser, but no sale deed had yet been executed. At this stage the mortgagor intervened to redeem. It was held by the Supreme Court that the right of redemption was not lost.^{97b}

A suit for redemption is essentially a suit for recovery of possession.⁹⁸ Where there was a clear stipulation in the mortgage deed that on redemption of the mortgage, the mortgagee would again become the lessee as he was before, it was held that such mortgagee could not be dispossessed on the ground that the mortgage had been redeemed. The mortgagor would have to file a separate suit for eviction to recover his possession from the lessee.⁹⁹

Under O. 34, R.1 of the Civil Procedure Code, all persons interested in the right of redemption or in the security, must be joined as parties to the suit for redemption of mortgage. However, the plaintiff, first of all, must establish his right to redeem the mortgage. That is to say, he must show that he was mortgagor in the capacity of his own right and title or was somehow interested in redeeming the mortgage. Sometimes, especially in the long term mortgages, by lapse of time, original mortgagor and mortgagee both die. But, the mortgage exists and thereby exists also the right of redemption. In such cases, it is necessary that in the suit for redemption, the party must prove his title to redeem. In *Sevaji Rajhunnatha v. Chinna Nayana*,¹ the Privy Council stated thus:

"A plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by the weakness of his opponents."

Thus, plaintiff has to prove his own right to redeem. He cannot ask the mortgagee (defendant) to prove that plaintiff has no such right. However, if there is *prima facie* proof of the mortgagor's title of redemption which is opposed by the other party, the burden of proof that mortgagor has no right of redemption shall shift on the defendant (mortgagee's representative). Where, the defendant admits that there was mortgage, the plaintiff need not prove the specific terms and conditions of the mortgage-deed.

97b. *L. K. Trust v. EDC Ltd.*, AIR 2011 SC 2060.

98. *Tanachand v. Seethai*, AIR 2007 SC 2039.

99. *Hashtimal & Sons v. P. Tej Raj Sharma*, AIR 2007 SC 3246; *Tanachand v. Seethai*, AIR 2007 SC 2039.

2039, rent-controlled premises was given on usufructuary mortgage to the tenant, the mortgagor landlord would become entitled to possession on surrender of tenancy because then the protection of the Rent Control Act would cease to be available.

1. (1964) 10 MIA 151 at 160; cited in *Mulla's TRANSFER OF PROPERTY ACT*, Ed VII (reprint 1990), p. 425.

In a suit for foreclosure, the Supreme Court observed that the right of redemption becomes extinguished on passing of the final decree in suit for foreclosure and suit for redemption. An order permitting foreclosure can be passed only upon ascertainment of the nature of the mortgage and the rights of the parties under it. In this suit for redemption, the decree directed the plaintiff to deposit a sum of money as a part of redemption being the value of substantial improvements effected by the mortgagees within the stipulated period. No protest was raised against it. It was deposited. The defendants were held to have accepted the correctness of the order. They were not allowed to raise their purported claim of redemption before the Supreme Court.²

Limitation.—Limitation for filing a suit for redemption is thirty years³ from the date on which the payment becomes due and right of redemption accrues to mortgagor.⁴

EFFECT OF REDEMPTION

The effect of mortgagor's right of redemption is that mortgagor becomes entitled to following rights:

(a) Mortgagor is entitled to get back the mortgage-deed and all documents relating to mortgage if they are in possession of mortgagee. On redemption, the mortgagor can compel the mortgagee to deliver him the documents of mortgage which, before redemption, were in his (mortgagee's) possession. The mortgagee is bound to return not only the mortgage-deed but also "all documents relating to the mortgaged property which are in his possession or power".

(b) Mortgagor is entitled to get back the possession of the property. In usufructuary mortgage, the mortgagor delivers the possession of the mortgaged property to mortgagee. The effect of right of redemption is that mortgagor may compel the mortgagee to give back the possession to him (mortgagor). The mortgagee is bound to deliver the possession of the whole property which was given to him under the mortgage. Mortgagee cannot be allowed to say that he does not know as to what has happened to a portion of the mortgaged property. If a portion of the property mortgaged is lost due to negligence of the mortgagee, he is bound to pay for it.⁵

A landlord mortgaged the property to his tenant. The document in question showed the intention of the parties to keep the relationship of landlord and tenant alive. Payment of rent was kept up by adjusting it against the amount of interest payable by the landlord. It was held that after redemption of such a mortgage, the landlord would not be entitled to receive possession. He would have to file an eviction suit under applicable rent control legislation.^{5a}

2. *K. Vilasini v. Edwin Peeter*, AIR 2009 SC 1041.

3. See Art. 61 (a) of Indian Limitation Act, 1963.

4. *Shankar Nathmal Chandra v. Bal Krishna Jagannath Gujjarhi*, AIR 2010 Bom. 4. Act applied to the redemption of a mortgage created before the Act, acknowledgment of existence of mortgage at subsequent stage extended period of limitation, *Jamal v. State of H. P.*, AIR 2010 HP 7, mortgages admitted that possession of mortgaged land was handed over to mortgagee 8 years before execution of the documents, limitation was to be reckoned from that date and not from the date of attestation of mutation.

5. *Anand Rao v. Bhikaji*, AIR 1922 Bom. 156.

5a. *Sahinabi Srinajadin Kanchaada v. Shiradi Hansraj Sharma*, AIR 2010 NOC 831 (Bom.).

The mortgage allowed the mortgagee to create tenancies on the mortgaged property. But the language of the deed did not make it clear whether such tenancies would be binding on the mortgagee also. It was held that the fact that the mortgagee after taking possession continued to receive rent from such tenants did not have the effect of creating a tenancy between the mortgagee and tenants.^{5b}

(c) Mortgagee is entitled to compel the mortgagee to re-transfer the mortgaged property. Such reconveyance may be demanded only when the mortgage was an English mortgage. In an English mortgage, the mortgagee binds himself to repay the loan on a certain date and transfers the property absolutely subject to condition that mortgagee shall re-transfer it to mortgagee on repayment of loan. Thus, when the mortgagee redeems an English mortgage by paying the debt on the specified date, the mortgagee is bound to reconvey the property to mortgagee. It may be noted that in usufructuary mortgage, the mortgagee transfers only the possession; therefore, on redemption the mortgagee becomes entitled to get back the possession. But, in English mortgage, the mortgagee transfers the property absolutely subject to a condition. Thus, in this form of mortgage on redemption, the mortgagee gets the right to compel mortgagee to reconvey the property absolutely to him.

The mortgagee can compel the mortgagee to reconvey the mortgaged property at his own cost. He may ask the mortgagee to re-transfer the property either to himself or to any third person on his direction. But, instead of asking for re-conveyance, the mortgagee may require the mortgagee to execute an acknowledgment in writing that mortgage now does not exist. Where mortgage was effected by registered instrument, such acknowledgment must also be registered.

Where a mortgaged property was redeemed by one of the co-mortgagees by paying the full amount to the mortgagee, it was held that the property having become free from the clutches of the mortgagee, the period of limitation for the co-mortgagee to sue for his share would be the ordinary period and not the especially relaxed period applicable to redemption of a mortgage.^{5c}

Partial Redemption

As a general rule, partial redemption is not permitted. Partial redemption means redemption of only a part of the mortgage. This situation may arise where a co-owned property is mortgaged jointly. For instance, A, B and C are the co-owners of a land. The land is mortgaged jointly to X who advances a loan of Rs. 40,000 to them jointly. A has half share in the land and B and C have one-fourth each. Now, the question is, whether A by making payment of Rs. 20,000 (which is proportionate to his half-share in mortgaged land) can redeem the mortgage to the extent of his share? According to the last paragraph of Section 60, a person having share in the mortgaged property, has no right to redeem only his own share of the property. In a transaction of mortgage the creditor values his security as one and indivisible. If the mortgagee is allowed to redeem the property in part, the mortgagee's interest of

getting back the whole amount including interest thereon, would be jeopardised. Partial redemption results in splitting of mortgagee's security. Therefore, this is disfavoured under English law and also under the Transfer of Property Act. The mortgagee cannot be compelled to permit redemption of part of the mortgaged property. The reason behind the rule that a share or portion of the mortgage-property cannot be redeemed is that mortgagee (creditor) values his security as one and indivisible. If the mortgagee is permitted to redeem the property in fragments then, "different proportions of value might be struck in different suits and utmost confusion and embarrassment would be created."⁶

The general rule under this section is, therefore, that a mortgage is indivisible and a suit by any of the several co-mortgagees to redeem only his portion of the mortgaged property is not maintainable. The Court has no power to compel the mortgagee to submit to a piecemeal redemption.⁷

Exception to the Rule.—The rule of indivisibility of mortgage has an exception. If the mortgagee himself acquires a share in the mortgaged property, the indivisibility of the mortgage is broken, and sharer in the remaining or integrity property is then entitled to redeem his share. For example, there are four fields which are mortgaged to X for securing a loan of Rs. 4000. The mortgagee sells one field to A for Rs. 1000, another field to B for Rs. 1000 and the third to C for Rs. 1000. The mortgagee sells the fourth field to X for Rs. 1000. Now, since the mortgagee (X) has purchased a part of mortgaged property, he himself has broken the integrity of the mortgage. In such situation, A, B and C who now become owners of their respective shares in the mortgaged property, may each redeem his field for Rs. 1000. Thus, where integrity of the mortgage is broken by the mortgagee himself by acquiring a share and there are two or more mortgages then, each mortgagee would be entitled to redeem his own share.

The mortgagee may break the integrity of mortgage by acquiring ownership in the mortgaged property. He may get the ownership either by purchase or inheritance or otherwise.^{7a}

Note.—The Amending Act of 1929 inserted word 'only' in the last paragraph of Section 60. The effect of this amendment is that at present, the partial redemption is permissible only where the mortgagee himself acquires the mortgaged property. Before this amendment, partial redemption was permitted on some other grounds. But, after 1929, the only exception to the general rule is that partial redemption is permitted if mortgagee acquires the ownership of part of the mortgaged property.

Extinguishment of Right of Redemption

The right of redemption is a statutory right. It can be extinguished only in the manner provided under Section 60 of this Act. The second paragraph of Section 60 provides for only modes of termination of the right of redemption—

- (a) By act of parties, and
- (b) By decree of Court.

5b. *Thakur Singh (Dr.) v. Mula Singh*, AIR 2015 SC 1.

5c. *Bachhaji Begumji Thakur v. Arjunji Saluji Thakur*, AIR 2013 Guj 37.

6. *Nilant v. Surash Chander*, (1886) 12 Cal. 414; 12 L.A. 171.

7. *Mirza Qasim Beg v. Sileo Shankar*, A.I.R. 1932 ALL 85.

7a. *Consuldar Manji v. Tularam Kisan Nalkwadi*, AIR 2010 NOC 832 (Bom.).

(a) *By act of parties.*—By 'act of parties' the right of redemption is extinguished when the parties themselves stipulate for it under a separate agreement after execution of the mortgage-deed. Such extinction (termination) of right is possible only where it is outside the transaction of mortgage. Thus, by act of parties redemption may be terminated only if such termination is not included in the mortgage-deed. If stipulation for extinguishing mortgagor's right of redemption is included in the mortgage-deed, it is a clog and therefore void; it cannot be given effect. Secondly, such stipulation must also be subsequent to the mortgage-deed. The act of parties intended to extinguish the right of redemption must not form part of the mortgage transaction; it must be outside the mortgage.

Extinguishment of the right of redemption by operation of law has not been included in Section 60. But, the right is lost also by operation of law. For example, where mortgagor obtains the right of redemption by succession or by adverse possession or the mortgagor gets mortgagee's right by inheritance, the right is terminated by operation of law.⁸

By the act of parties, the right of redemption may be extinguished in the following manner:

(i) Redemption of mortgage by mortgagor.

(ii) Foreclosure of mortgage by mortgagor under Section 67.

(iii) Sale by mortgagor under Section 68.

(iv) Lapse of time i.e. the exercise of right becomes barred by limitation.

Sale by mortgagor under statutory right.—The secured assets were sold by the bank under Section 13 of the Security Interest (Enforcement) Rules, 2003 under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, by public auction. The sale ended in issuance of sale certificate as per Rule 9 (7) in favour of the auction purchaser. It was held that the sale had become absolute and title came to be vested in the auction purchaser. Such a sale certificate does not require registration. The sale becomes complete vesting the right in the property in the auction purchaser. The mortgagor could not approach the bank for repayment after the property was sold. The right to redeem can be exercised by the borrower before it is foreclosed or the estate is sold. The right of redemption is not to prevail over sale already effected under SAR FAR ESI Act.⁹

The right of redemption continues till sale of property by the secured creditor is completed by registration of the sale deed.¹⁰

Mortgagor authorising sale.—The mortgagor executed a document expressing his inability to pay the borrowed amount. He gave right to the mortgagee to auction the property and receive the resultant amount. This was

8. *Markanda v. Varada*, AIR 1949 Pat 197.

9. *K Chidambaram Manickam v. Shaktena*, AIR 2008 Mad 108 (DB); *Ganuru Enterprises v. State Bank of India*, AIR 2012 MP 35, another such case, sale by auction by the bank after default by the borrower. Subsequently, no settlement by the bank with the borrower could be used to undo it by paying back auction price. The auction purchaser was not a party to the settlement.

10. *Shaktena v. Bank of India*, AIR 2008 Mad 10.

held as amounting to extinction of the right of the mortgagor to redeem the mortgage.¹¹

(b) *By decree of Court.*—The right of redemption may be extinguished also by decree of a Court. Such decree must be final decree. It may be noted that in the suit on mortgages, two decrees are passed by the Court. One is preliminary decree and the other is the final decree. Extinguishment by Court as contemplated under this section is by final decree of the Court. Such final decree is passed by Court either in the mortgagor's suit for redemption under O. 34, R. 8(3) of the Civil Procedure Code or, in mortgagee's suit for foreclosure under O. 34, R. 3(2) of this Code. The final decree declares that the mortgage is foreclosed i.e. no mortgage exists at all. This extinguishes the mortgagor's right of redemption.

The mortgagee's claim to absolute ownership of the mortgaged property is sustainable when such claim is based on a transaction with the owner-mortgagor, such as a sale of the mortgaged property by the mortgagor to the mortgagee by a Court auction, and the period of 12 years, has expired from the date of sale, the mortgagee becomes the owner by adverse possession.¹²

Redemption of usufructuary mortgage.—It has been pointed out by the Supreme Court that Order 34, Rule 14, CPC, prohibits the mortgagee from bringing the mortgaged property to sale in enforcement of the mortgage. The suit in this case filed by the mortgagee was not in accordance with the above provision. The act of bringing the mortgaged property to sale in the execution of the decree obtained in such suit and himself purchasing the same in public auction was clearly barred by Section 34, Order 14. The Court applied Section 90, illustration (C) Trusts Act, 1882, and further held that the purchase was only in trust for the mortgagor. The right to redeem was not extinguished by such a purchase by the mortgagee. The suit for redemption was found to have been brought within the period of limitation, the Supreme Court upheld the order of the High Court in decreeing the same.¹³

No period was fixed for redemption of a usufructuary mortgage. The Court held that the principle of "once a mortgage always a mortgage" applied. The mortgagee could not claim that he had become the owner of the mortgaged land by efflux of time, the mortgagor having not redeemed the mortgage. The redemption order passed by the Collector under the Punjab Act was held to be valid.^{13a}

Payment priorities, priority under Employees Provident fund etc. Act, 1952.—The priority given to contribution from the employer under the EPF Act operates against mortgage or pledge of property created by the employer. It is a prior payment out of the sale proceeds of the property. The property of the employer in this case was pledged with a bank as security for repayment of loan. It was held that such property could be attached and sold for recovery of PF dues.^{13b}

11. *Syed Noor Mohammad v. Syed Khatja Mohiuddin*, AIR 2008 AP 82.

12. *Kishanji Aminai v. Jagdeva Gumber*, AIR 2008 SC 276.

13. *M. R. Satwaji Rao v. B. Shama Rao*, AIR 2008 SC 2328.

13a. *Sudhakar Singh v. Kail Ram*, AIR 2012 NOC 343 P & H.

13b. *Maheshwara State Co-op. Bank Ltd. v. Asst. P. F. Commissioner*, AIR 2010 SC 868.

Effect of property becoming evacuee property.—It was a case of usufructuary mortgage. The mortgagee was declared an evacuee as he migrated to Pakistan. It was held that in such a case, the mortgagee's (evacuee's) interest would be limited to mortgagee's rights and only those rights would vest in the custodian. The title to property would never vest in the custodian, and therefore the custodian would have jurisdiction to accept redemption.^{13c}

Priority over Insolvency Act.—In the distribution of the property of the insolvent debtor among his creditors, it was held that the mortgage created on his property gave priority to the mortgagee over the priority contemplated by Section 61 of the Insolvency Act.^{13d}

60-A. Obligation to transfer to third party instead of redemption, then on the fulfilment of any condition on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee : instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagee may direct ; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance ; but requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagor who is or has been in possession.

ASSIGNMENT OF MORTGAGE INSTEAD OF RETRANSFER

Under Section 60 the mortgagor, while redeeming the mortgage, is to require the mortgagee to re-transfer the mortgaged property to him (mortgagor) or to a third person whom he directs. Under Section 60-A the mortgagor can require the mortgagee to assign (transfer) the mortgage-debt to a third person instead of asking the mortgagee to re-transfer the property to him as provided in Section 60.

Section 60-A was included in this Act by the Amending Act of 1929. The object of this section is to enable the mortgagor to pay off the debt of mortgagee by taking loan from another person on security of the same property.

It is significant to note that Section 60-A enables a mortgagor to require the mortgagee not to re-transfer the mortgaged property to a third person but to transfer the mortgage itself. Thus, mortgage as such is not extinguished. It is

13c. *Culzar Singh v. Financial Commissioner and Secretary to Govt. of Punjab*, AIR 2010 P & H 114.

13d. *Parit Dayabhai Ramjibhai v. Ranaji Nagrik Sahakar Bank Ltd.*, AIR 2010 Guj 54. There could be no priority in favour of the bank under the Securitisation etc. Act, 2002 because no mortgage in writing was created in favour of the bank.

kept alive, and mortgage-debt is to be assigned by mortgagee to such third person. Under this section an obligation may be imposed on a mortgagee to transfer the mortgage-debt to a third person nominated by the mortgagor. However, the mortgagee is entitled to require the mortgagee to assign the mortgage-debt to a third person only when debt has become payable and the mortgagor has paid the mortgage-money as required under Section 60. The right conferred on a mortgagor under this section may be exercised not only by original mortgagor but also by any *puisne* mortgagee, who may be an in between mortgagor for any subsequent mortgage. The requisition of a *puisne* mortgagee will prevail over that of a mortgagor. As between the mortgagees themselves, the requisition of a prior mortgagee will get priority over that of a subsequent one.

However, the provisions of this section are not applicable where the mortgagee is in possession of the property. Reason behind this exception is that a mortgagee in possession has to maintain account of all the rents and profits (benefits) of the property during his possession. He has to maintain an account even after assignment of the mortgage-debt. The request by mortgagor to assign the mortgage-debt to a third person would debar him (mortgagor) from calling the mortgagee to give account of the benefits of property after assignment of the mortgage.

60-B. Right to inspection and production of document.—A mortgagor, as long as his right of redemption subsists, shall be entitled at the reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

MORTGAGOR'S RIGHT OF INSPECTION OF DOCUMENTS IN POSSESSION

OF MORTGAGEE

This section was included in the Transfer of Property Act by Amending Act of 1929. In a mortgage, the mortgagor may have to handover the title-deeds or other documents relating to mortgaged property to the mortgagee. During subsistence of the mortgage, such documents are to remain with mortgagee. This section provides that so long as the documents are in the custody or possession of mortgagee, the mortgagor has right to ask mortgagee to produce the documents for his inspection. The mortgagor, under this section, is entitled, at reasonable time and at his own cost, to require the mortgagee to produce the documents in his possession and to have copies or abstracts of such documents.

61. Right to redeem separately or simultaneously.—A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

SYNOPSIS

- Separate or Simultaneous Redemption.
- Doctrine of Consolidation.

• Sec. 61 does not recognise equity of consolidation.

Separate or Simultaneous Redemption.—Under this section, a mortgagor who has executed two or more separate mortgages in favour of the same mortgagee, has right to redeem any one mortgage separately or any two or more mortgages together. However, the right is subject to any contract to the contrary. This section entitles a mortgagor also to redeem any one mortgage mortgage. The effect of the provisions of this section is that mortgagee cannot compel the mortgagor to consolidate all mortgages for purposes of redemption. Consolidation means bringing together. Accordingly, where several independent mortgages are executed in favour of one mortgagee the mortgagee cannot require mortgagor to redeem the mortgage of his (mortgagee's) choice by consolidating all mortgages. Section 61 abolishes the equitable doctrine of consolidation which was recognised under English law. This section was modified by the Amending Act of 1929.

Doctrine of Consolidation.—Doctrine of consolidation was an equitable doctrine under English law. Under this doctrine, where two or more mortgages were executed in favour of the same mortgagee, the mortgagee could require the mortgagor to redeem all mortgages in a consolidated form. The reason behind such rule was that very often a mortgagor used to mortgage two or more properties and took heavy sum of money as loan. But, some of such properties were invaluable while the value of others increased subsequently. Obviously, the mortgagor was tempted to redeem the mortgage of only that property which subsequently increased in the valuation. This was found by equity against the interest of mortgagee. Therefore, equity provided that since right of redemption was an equitable right, the mortgagor while exercising this right must also be expected to do equity. One who seeks equity, must do equity, is the maxim. For example, A mortgaged two properties X and Y to B. Now if subsequently the market-value of property X increased suddenly, it was usual that A wanted to redeem that mortgage first. For B (mortgagee) that was a bad bargain because for a heavier amount he had only property Y which was of lesser value. Therefore, in order to protect the interest of mortgagee, equity provided that mortgagee could require the mortgagor to redeem both mortgages together. Thus, B was entitled to refuse redemption of X unless property Y was also redeemed. However, the equity or consolidation was abolished in England by Section 17 of the Conveyancing and Law of Property Act, 1881. But, now it is re-enacted in Section 93 of the Law of Property Act, 1925, subject to a contract to the contrary. In practice, in England normally this section is avoided by express contract in the mortgage-deed.

Section 61.—Section 61 of the Act does not recognise the equity of consolidation. The mortgagee cannot require the mortgagor to consolidate all the mortgages and redeem all of them together. This section gives right to a mortgagor to redeem the mortgages separately or simultaneously. He is not bound to redeem simultaneously. For example, A mortgages two properties X and Y to B. Market-value of the two properties are almost equal when the mortgage-deed is executed separately but in favour of the same mortgagee B.

When the redemption becomes due, it happens that the market value of property X is enhanced but that of property Y is reduced. Both the mortgages have now become payable. Under this section, unless there is contrary contract for it, the mortgagor A has right to redeem mortgage on property X first and leave the mortgage on Y to be redeemed later on. It is to be noted that provisions of this section are applicable also where there are two mortgages on the same property and mortgagees are different persons.

It is possible to take loans by effecting mortgages from two different persons on the same property. This section entitles the mortgagor to redeem each mortgage separately unless any contrary intention is expressed in any of the mortgage-deed. After amendment in 1929, the effect of this section is to abolish the doctrine of consolidation of mortgages both, in respect of the same properties as well as in respect of different properties.¹⁴

62. Right of usufructuary mortgagor to recover possession.—In the case of usufructuary mortgage, the mortgagor has a right to recover possession of the property, together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee—

- where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;
- where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in Court as hereinafter provided.

RIGHTS OF USUFRUCTUARY MORTGAGOR

Section 60 of the Act provides for mortgagor's right of redemption irrespective of the kind of mortgage. Section 62 deals with mortgagor's right to recover the possession of property on redemption of usufructuary mortgage. The right given in Section 62 is in addition but also subject to, rights of mortgagor in general as laid down in Section 60. In usufructuary mortgage, the mortgagor delivers the possession of property to mortgagee who is entitled to receive the rents and profits of the mortgaged property. Therefore, it is necessary that some special provisions are made for a usufructuary mortgage for the return of his property while redeeming the mortgage. This section lays down the rule as to when a usufructuary mortgagor becomes entitled to get back the possession of mortgaged property and the documents.

Section 62 provides that usufructuary mortgagor is entitled to recover the possession of mortgaged property together with mortgage-deed in the following circumstances:

¹⁴ *Jai Nandani v. Gokul Singh*, A.I.R. 1937 Oudh 321 : 168 I.C. 40.

(a) Upon payment of the principal money (actual amount of loan) where the mortgagee was to adjust interest from the rents and profits of the property.

(b) Upon expiry of the term prescribed for payment of mortgage-money (interest plus principal money) and mortgagor either pays or lenders to pay the balance, if any or, deposits it in court.

Clause (a).—As discussed earlier, in usufructuary mortgage, when the stipulate that interest on the principal money taken as loan, shall be adjusted by the mortgagee from the rents and profits of the property in his possession. In such cases, the mortgagor is entitled to recover possession of the property and such cases. Expression, 'when such money is paid' under clause (a) means payment of actual money plus the interest due on it which had already been adjusted in the form of benefits derived from the property. Therefore, the mortgagee has to return the possession when mortgagor pays the loan. However, it is necessary that interest on the principal money must be satisfied from out of profit and the interest due could not be satisfied from rents and profits of the property upto the date when payment is being made, the mortgagor cannot claim return of the possession. Where usufructuary mortgagor sues to recover possession before the whole interest is adjusted from the usufruct, the debt is not discharged and the suit must be dismissed as premature.¹⁵ But, the mortgagee cannot remain in possession of the mortgaged property after the mortgage-money (interest from usufruct plus principal money) is satisfied from the usufruct and the payments made by mortgagor. He must hand over the possession to mortgagor.

In *K. Varadhi v. P.C.K. Hiji*,¹⁶ the Supreme Court held that where a usufructuary mortgagor could not recover possession on the basis of an oral mortgage as it could not be proved for want of registration, it was open to him to recover possession on the strength of his title.

Clause (b).—Refers to cases where the parties stipulate that whole or a part of rents and profits are to be taken by mortgagee in lieu of interest and part in payment of the mortgage-money. Where the parties stipulate for payment of only interest or a part of the mortgage-money out of the income of the property, they may fix a term for payment of principal money or the balance including interest. In such cases the mortgagor can recover possession of mortgaged property on the expiry of that term and on payment of the mortgage-money or balance or on its tender to the mortgagee. Where no term is fixed by the parties and the stipulation is for payment of debt out of rents and profits also, the mortgagor is entitled to redeem and recover possession when the principal money is discharged out of the residue of the income. In the case of a usufructuary mortgage, onus lies on the mortgagee to prove that some amount is due to him on the date of application for redemption.

Period of limitation.—In a case before the Rajasthan High Court, the mortgage money was offered by the mortgagor to the mortgagee several times during his life time and after his demise by his son. But he refused or ignored to accept it. The son brought an action to enforce the right of redemption. But by this time more than 30 years had passed from the date when the right to redeem accrued. Article 61 (a) of the Schedule to the Limitation Act, 1963 prescribed 30 years period from the date of accrual of the right of redemption. The Courts held the suit to be barred by limitation.^{16a}

The right accrues the date on which the mortgage money is paid. The Supreme Court said that mere expiry of the period of 30 years from the date of mortgage does not extinguish right of mortgagor under Section 62.^{16b}

63. Accession to mortgaged property.—Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership.—Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum.

In the case last mentioned, the profits, if any, arising from these accessions shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interests, if any, payable on the money so expended.

SYNOPSIS

- Accession to Mortgaged Property.
 - Accessions to Property.
 - Natural Accessions.
 - Acquired Accessions.
- Separable acquired accessions.
- Inseparable acquired accession.

15. *Tinganna v. Nallamthi*, (1883) 16 Mad 486.

16. AIR 1974 S.C. 689.

16a. *Mohini Lal v. Mohan Lal*, AIR 2013 Raj 187.

16b. *Singh Ram v. Shree Ram*, AIR 2014 SC 3417.

ACCESSION TO MORTGAGED PROPERTY

Section 63 incorporates rules relating to accessions to the mortgaged property. It provides that in the absence of any contract to the contrary, the mortgagor is entitled to accession, if any, to the mortgaged property while redeeming the mortgage. As a general rule, the accessions to the mortgaged property in possession of the mortgagee are treated as part of the property which mortgagor is entitled to recover together with property when he redeems the mortgage.

Accession to Property.—Accession to property has not been defined in this Act. Accession means any kind of addition in the property which increases its value so that property becomes more advantageous. Such additions or improvements may be made in the property either through natural process or by mortgage. Whether there has been any accession to the mortgaged property during the period of mortgage or not, is a question of fact. This can be proved or disproved on the basis of facts and circumstances. However, the test is, whether the property becomes more advantageous after such accession or not? If the property subsequently becomes more advantageous, there is some accession to the property. Any acquisition or improvement which increases the value of the mortgaged property either in point of its area or title or in any manner whatsoever, would be an accession to that property.

This section deals with following kinds of accession :

- (a) Natural accession, and
- (b) Acquired accessions. Acquired accession may be either,
 - (i) separable acquired accession, or
 - (ii) inseparable acquired accession.

Natural Accession.—Natural accessions are those accessions which are not made by parties to mortgage. They may arise as accretions by the course of nature. For example, where the area of mortgaged property is increased by the change of course of river which marks its boundary the accession is natural. Under Section 70 of this Act natural accessions are regarded as additions to the security and mortgagor is entitled to redeem them together with the main property. Natural accessions arise also when the area of the mortgaged property is increased by some official act or omission of the revenue department. Thus, where the area of a mortgaged property without mentioning its boundary lines was increased at a survey settlement, it was held that such increase was natural accession. Therefore, on redemption, the mortgagor was entitled to that increase (accession). Similarly, where the mortgagor is put in possession of a larger area of the mortgaged property by mistake, the mortgagor is entitled to redeem also such excess property.

Section 63 provides that as a general rule, natural accessions, if they have arisen during the continuance of mortgage, can be redeemed by the mortgagor together with mortgaged property. Mortgagee has no right to retain or otherwise claim such accessions when mortgagor redeems the mortgage.

Acquired Accessions.—Acquired accessions are those accessions or additions to the property which are made by the mortgagee during the period of mortgage. The mortgagee may raise some structure or do some such or make things on the property for its more beneficial enjoyment which increases its value. Thus, an accession may be acquired by the mortgagee to the mortgaged property during mortgage for making the property more beneficial to him. Such

additions or accessions may either be separable or, inseparable from the mortgaged property.

(i) **Separable acquired accessions.**—Where the acquired accession is separable from the mortgaged property, the mortgagee would remove them when mortgagor redeems the mortgage. The mortgagor is not entitled to take them together with the mortgaged property. If mortgagor insists upon taking also the accessions together with mortgaged property, he must pay the mortgagee the cost of such acquisitions. Where the mortgagee constructs a temporary fin-shed or makes a boundary wall by fencing-wires, the mortgagor can take them only when he pays to the mortgagee the expenses on these additions. It may be noted that mortgagor's right to recover property accrues only on redemption. Therefore, if mortgagor wants also the accession together with the mortgaged property he must either pay or promise to pay the expenses on accession to the mortgagee at the redemption of mortgage. If he does not pay or fails to even promise to pay the cost of acquisition at the time of redemption, he shall be deemed to have abandoned his claim over the accessions.

(ii) **Inseparable acquired accessions.**—Accessions which are of permanent nature become part and parcel of the mortgaged property. Such accessions cannot be separated from the property. Therefore, on redemption, the mortgagor has no option but to take these acquisitions together with mortgaged-property. Thus, mortgagor is entitled to all acquisitions which are not capable of being separated from the principal property. But he is liable to pay the expenses incurred by mortgagee in making the acquisitions. However, he is liable to pay the cost and take the acquisition only in the following two cases :

- (i) Where the accessions are necessary to preserve the property from destruction, forfeiture or sale, or

- (ii) Where accessions were made with mortgagor's consent.

Without mortgagor's consent, the mortgagee can make permanent accessions only when it is necessary to preserve the property. Where the mortgagee constructs a building without consent of mortgagor which is in no way necessary for maintenance or preservation of the mortgaged property, the mortgagee cannot claim its cost. If planting of trees as grove is not necessary to preserve the property from destruction, forfeiture or sale, the mortgagee cannot claim compensation or expenses. The mortgagor was also not liable to pay the cost of constructing a new well in an agricultural field where there was already a well in that field. In *Kallu v. Ganesh*,¹⁷ the mortgaged house was already in dilapidated condition which was not suitable for residence. The mortgagee rebuilt that house i.e. made a new construction. It was held by the Allahabad High Court that since the house had already fallen, there was no need of preserving it. Accordingly, the new construction was held not necessary for preserving the mortgaged property and the mortgagor was not liable to pay its cost. However, such accession may be regarded as improvements on the mortgaged property dealt with under Section 63-A.

When mortgagee is entitled to the cost of accessions to mortgaged property, he can claim only actual cost incurred in acquiring the accession with usual interest on the same rate as fixed in principal money. Where no interest was

fixed in the mortgage, the mortgagee shall get the interest at the rate of nine percent per annum. But where mortgagee claims cost of accessions and also interest on the cost, the profits arising from the accession must be credited to the mortgagee. If mortgage is usufructuary, the profits must be adjusted against interest payable on the money (cost) expended in acquiring the accession. However, adjustment of interest payable on the cost may be agreed otherwise between the parties to usufructuary mortgage.

63-A. Improvements to mortgaged property.—(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagee, upon redemption, shall, in the absence of a contract to the contrary, be entitled for the improvement, and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration, or was necessary to prevent the security from becoming insufficient, or was made in compliance with lawful order of any public servant or public authority, the mortgagee shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the rate of nine percent per annum and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

IMPROVEMENTS TO MORTGAGED PROPERTY

Section 63-A was included by the Amending Act of 1929. Before this amendment, the law on this point was neither clear nor uniform. During mortgage the mortgagee was not allowed to make any improvements except under Section 63 as accessions, or by way of repairs of the property as given in Section 67. But, some Courts permitted reasonable improvements to mortgaged property and on redemption the mortgagee was entitled to get also the cost of such improvements. This section was added in the Act to make uniform law regarding improvements to mortgaged property made by mortgagee during mortgage. It incorporates English law on improvements which was being followed by some Indian Courts before inclusion of this section.

As a general rule, Section 63-A provides that in the absence of any contract to the contrary, if the mortgaged property has improved during the mortgage, the mortgagor shall be entitled to that improvements without paying its cost. Accordingly, normally the mortgagee is not permitted to make improvements on the mortgaged property and if he does so, the mortgagor while redeeming the mortgage is not liable to pay its cost.

But, this general rule is subject to an exception. It is provided that the mortgagor is liable to pay the cost of improvements made by mortgagee in the following circumstances:

- (i) where the improvements made by mortgagee were necessary to preserve the property from destruction or deterioration, or
- (ii) where such improvement was necessary to prevent the security from becoming insufficient, or
- (iii) where the improvement was made in compliance with the lawful order of any public servant or public authority e.g. Municipality.

Section 63-A of the Act gives recognition to English law which provides for reasonable improvements on the mortgaged property. English law may be stated thus:

"The improvements must always be reasonable having regard to the nature and value of the estate; for, if it were not so, a weapon would be put in the mortgagee's hands with which he might greatly clog right of redemption, which he has no right to make more expensive than is necessary to keep the estate in good repair and working order and to protect the title."¹⁸

The general rule as laid down in sub-section (1) is that mortgagee is not entitled to spend money in improving the property which may be done in such a way as to make it impossible for the mortgagor to redeem the mortgage. This would be improving a mortgagor out of his estate which is not permitted in law. Where the cost incurred in making improvements was five times the mortgage-money, it was held that mortgagee's claim for the value of improvements cannot be allowed.¹⁹ This section is subject to any contract to the contrary. Thus, if the parties have agreed that mortgagee can make improvements and mortgagor on redemption shall pay the cost, this section will not apply. But unless there is such a contract to the contrary, the improvements made by mortgagee are governed by sub-section (2). This sub-section provides for an exception to the general rule. It is provided that mortgagee can claim the cost of improvements only when such improvements were reasonable. Under this section, the improvements are reasonable if they were (i) necessary to preserve the property or, (ii) necessary so as to keep its value at least equal to the security (money advanced) or, (iii) necessary because of any order or direction of the government authority e.g. Municipality. The result is that if the improvements by mortgagee are not made due to any of the above-mentioned reasons, the mortgagor is not liable to pay its cost while redeeming the mortgage.

The mortgagor is liable to pay the cost of improvements if they are necessary to preserve the property from being destroyed or deteriorated. When mortgaged property is destroyed, the mortgagee who had advanced loan on security of that property is also destroyed. This is so because mortgagee then cannot get back his money from out of that property. It is, therefore, necessary and also a reasonable act on his part that he makes such improvements which may keep the property intact. Whether the expenditure was necessary to preserve the property from destruction is a matter of fact. Where some repair

18. See Fisher's LAW OF MORTGAGES, Ed. VII, p. 728.

19. *Ramappa v. Yellappa*, A.I.R. 1920 Bom. 150.

work was done by mortgagee only to bring increased rents and it was proved that those repairs were not necessary to preserve the property, it was held that mortgagee was not entitled to the money spent on it.²⁰ Similarly, where a *Kutchia* house was demolished and in its place a *Pucca* house was constructed the Allahabad High Court held that it was not an improvement for preservation of property and the mortgagee was not liable to pay its costs.²¹ The improvements made to agricultural lands so as to increase the produce, do not come within the scope of sub-section (2) and mortgagee is not liable to compensate the expenditure on it.²² However, besides urgency of making improvements which can be proved or disproved on the basis of facts, it is also necessary that the improvements are made with a *bona fide* intention. If the improvements are not made with *bona fide* intention, the mortgagee cannot claim the costs of the improvements.²³

When the improvements on the mortgaged property are found justified under Section 63-A, the mortgagee is entitled to get its 'proper cost' in addition to the mortgage-money. Proper cost means actual amount spent, when the improvement was made plus the usual interest from that date. Where no rate of interest has been fixed, the rate of interest is nine percent per annum and the profits, if any, accruing due to such improvements.

This section is subject to any contrary contract entered into between the parties. If the parties stipulate otherwise than provided in Section 63-A, that contract prevails as against the provisions of this section. The mortgagee may permit making of any improvement on the property on terms and conditions laid down under a contract. He may also stipulate that mortgagee cannot make any improvement in any event. If there is any such contract, the terms and conditions prevail over the provisions of this section.

64. Renewal of mortgaged lease.—Where the mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagee, upon redemption, shall, in the absence of contract by him to the contrary, have the benefit of new lease.

Section 64 provides that if mortgaged property is a lease hold property and during the continuance of mortgage the mortgagee gets that lease renewed then, on redemption the mortgagee shall be entitled to have the benefit of the new lease. This is, however, subject to any contract to the contrary.

It is significant to note that when a property is transferred by way of lease, the lessee gets demise which is only an interest in that property. This interest is called lease-hold. Thus, the lessee has the lease-hold. What remains with lessor (owner) after this lease is his reversionary right or reversion. Under the law, lease-hold and reversion are two independent interests of the same property. Both of such interests may be transferred separately. It is, therefore,

20. *Sury Mal v. Chandra Bhan*, AIR 1939 Lah. 129.

21. *Ram Aranj v. Hiralal*, AIR 1949 All. 681.

22. *Rup Ram v. Munshi Chilla*, AIR 1960 Punj 480 (the provision of this section was made applicable in Punjab by the Court).

23. *Vinodapuri Nidhar v. Appani Gounder*, AIR 1973 Mad. 454.

possible that mortgaged property is a lease hold property. Now if such lease hold is mortgaged, it is obvious that mortgage can exist only upto the term of the lease.

This section lays down the rule that where mortgagee himself gets the lease renewed, the mortgagee while redeeming the mortgage would be entitled to get back the lease-hold mortgaged property together with its renewed lease. The reason behind giving mortgagee a right to redeem also the renewed lease is that "this additional term comes from the old root, and is of the same nature, subject to the same equity of redemption."²⁴ It is also to be noted that such renewal of lease is regarded as an accession to the mortgaged property to which a mortgagee is entitled while redeeming the property. But, the mortgagee has a right to get the cost of renewal of the lease. A similar provision is given also in Section 72(e) of this Act.

65. Implied contracts by mortgagor.—In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

- (a) that interest which the mortgagor professes to transfer to the mortgagee, subsists, and that the mortgagor has power to transfer the same;
- (b) that the mortgagor, will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;
- (d) and, where the mortgaged property is a lease, that the rent payable under the lease conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that mortgagor with so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the condition contained therein and observe the contracts binding on the lessee, and indemnify mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;
- (e) and, where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such

24. See *Mulla's TRANSFER OF PROPERTY ACT*, Ed VII (reprint, 1990), p. 449.

prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

SYNOPSIS

- Covenant for title.
- Covenant for defence of title.
- Covenant for payment of public charges.
- Covenant for payment of rents.
- Covenant for discharge of prior mortgage.
- Covenants run with the land.

IMPLIED COVENANTS OF MORTGAGOR

Sections 65 and 66 of the Act provide for liabilities of a mortgagor. Section 65 incorporates the liabilities of a mortgagor which are implied in every mortgage. These liabilities of mortgagor are deemed to be in every mortgage except where the parties have agreed otherwise. The liabilities imposed on mortgagor under this section are similar to the implied covenants of a seller.

Section 65 provides that subject to any contract to the contrary every mortgagor is deemed to have made following covenants:

- (a) Covenant for title.
- (b) Covenant for defence of title.
- (c) Covenant for payment of public charges.
- (d) Covenant for payment of rents.
- (e) Covenant for discharge of prior mortgage, if any.

(a) *Covenant for title*.—In a mortgage, the mortgagor transfers an interest in the mortgaged property in favour of the mortgagee. It is implied that if he is mortgaging his property, he possesses that interest. Thus, in every mortgage there is an implied covenant that the interest which mortgagor is transferring subsists and is owned by him. Further, he also covenants (contracts) impliedly that the interest is a transferable interest. For every valid transfer of property including transfer by way of mortgage, it is necessary that transferor possesses the title of the interest and that such interest is a transferable interest. Under Section 6 of this Act a non-transferable interest cannot be transferred. When a person mortgages his property he is presumed to covenant for his title and his power to deal with it. Thus, the covenant implied is twofold:

(i) as to the 'quantum' of interest which is being mortgaged and, (ii) as to the transferability of interest. Once a person mortgages his property and takes some loan, he cannot, in a suit by mortgagee, take the plea that he had no power to effect the mortgage. This estoppel operates also against the successors

or representatives of the mortgagor. The mortgagee too cannot deny the title of mortgagor during the subsistence of the mortgage.

When the owner of an undivided share in a joint property mortgages his undivided share the interests of other co-sharers is not affected. There is an implied covenant for the transfer of only mortgagor's own quantum of share. In such cases, the mortgagee takes it subject to the right of these co-sharers to enforce a partition and thereby convert undivided share of the whole property into a definite portion held by mortgagor.²⁵ A mortgagee who gives money to a mortgagor upon a joint mortgaged property, must be deemed to take it subject to the liability of that property to be partitioned subsequently.

Where mortgagor commits a breach of implied covenant for title i.e., mortgages a property in which he has no transferable interest, the mortgagee is entitled to compensation with interest. Where a mortgagor mortgages a property having no interest at all but subsequently acquires the interest thereto, the mortgagee is entitled to the subsequently acquired interests for purposes of his security.

(b) *Covenant for defence of title*.—The mortgagor contracts impliedly to defend his title at his own cost when he is in possession of the mortgaged property. If he is not in possession, he impliedly covenants for helping mortgagee in defending the title. The mortgagor's help to mortgagee in defending the title of property means providing expenses incurred by mortgagee in defending the title and also to provide him the evidence of title or other documents.

When a mortgagor advances money, the only security for its repayment is the mortgaged property the title of which vests in the mortgagor. If this title is in danger and mortgagor is going to be deprived of it, the mortgagee's security is also in danger. Therefore, it is in the interest of every mortgagee that title of the mortgaged property remains intact. Accordingly, clause (b) of Section 65 provides for implied duty of mortgagor to defend his title or to help mortgagee in defending the same if the title is in danger.

If the property is in possession of the mortgagee, he has to defend the title in his own interest. Under Section 72 of this Act, the mortgagee is entitled to add to his mortgage-money the amount of expenses incurred by him in defending the mortgagor's title.

(c) *Covenant for payment of public charges*.—After execution of mortgage, it is implied duty of every mortgagor that he continues to pay the revenue, taxes or other public charges as before. If he fails to do so, the property may be sold by the public authority for realisation of taxes etc. In such a situation, the interest of mortgagee is jeopardised. The implied covenant under clause (c) of this section is personal to mortgagor and does not arise by virtue of his possession of mortgaged property. The liability of the mortgagor to pay the public charges continues even though he transfers his equity of redemption. But, in the event of Court-sale when the equity of redemption is extinguished (lost),

²⁵ *Mohammad Afzal v. Abdul Rehman*, AIR 1932 P.C. 235.

the implied duty of mortgagor to pay public charges comes to an end. However, if mortgagor himself purchases the property in the Court-sale, the original mortgage is not extinguished and the liability to pay the public charges continues.

(d) *Covenant for payment of rents.*—Where mortgaged property is a lease hold property, the mortgagor has to pay its rents. There is an implied covenant that such mortgagor has paid the rents of that property and that no rents are due on the date of execution of mortgage. The mortgagor further covenants implicitly that so long as the mortgage does not take possession of the property, he shall continue to pay the rents and perform other conditions of the lease.

This clause provides for the rights and liabilities of mortgagor and mortgagee as between themselves. Therefore, when the mortgagee takes possession of the leasehold mortgaged property, his liability to pay rents to mortgagor's lessor is determined under Section 108 (j) and not under this section.

(e) *Covenant for discharge of prior mortgage.*—A mortgagor is subject to an implied liability to discharge prior mortgage, if any. It is possible that there is mortgage of an already mortgaged property. For example, A mortgages his property to B. If there is no contract to contrary A can mortgage this property also to C. This clause incorporates the rule that A has implied duty for discharge of all incumbrances or prior mortgage (or B) towards C who is second mortgagee. The mortgagor is presumed to have covenanted with the second or third or any other subsequent mortgagees to pay off prior mortgage debt on its becoming due. The result is that if the mortgagor commits any breach of this liability, the second or any subsequent mortgagee would be entitled to sue for his mortgage-money under Section 68. The mortgagor cannot take the plea that there is no personal covenant or privity of contract between him and such subsequent mortgagee, in the mortgage-deed. In *Gauri Shankar v. Bhairon*,²⁶ the mortgagor left a sum of money with a mortgagee and authorized him to redeem the prior mortgage. This sum of money was found to be much less than was necessary to redeem the prior mortgage. The Oudh Chief Court held that mortgagor was liable to pay the excess amount incurred by the mortgagee in redeeming prior mortgage.

Covenants Run with the Land.—Last paragraph of this section provides that mortgagor's implied covenants given in this section are not personal; they run with the land. Where covenants run with the land, they are supposed to be annexed or attached to the land. Therefore, such covenants are binding irrespective of the person to whom the land may pass on subsequently. It is to be noted that mortgagor's implied liabilities under this section are mortgagee's implied rights under a mortgage. The mortgagee's rights under this section run with the mortgaged property. Thus, not only the mortgagee but any one claiming through him is entitled to get the benefit of these covenants. For example, the covenant for title implied under clause (a) may be enforced

against mortgagor not only by mortgagee but also by a person purchasing the interest of the mortgagee.²⁷

65-A. Mortgagor's power to lease.—(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed, and as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

SYNOPSIS

- Mortgagor's Right to Lease.
- Conditions for lease of mortgaged property.

MORTGAGOR'S RIGHT TO LEASE

Section 65-A incorporates rules relating to mortgagor's right to effect lease of the mortgaged property. This section was introduced by the amending Act of 1929. Before this amendment, there were conflicting decisions regarding mortgagor's right to transfer the mortgaged property by way of lease. As regards English mortgage, since this form of mortgage is an absolute conveyance, the mortgagor had no power at all to lease out the mortgaged property. In other kinds of mortgages, it was held that mortgagor had power to grant lease provided it did not affect the security of the mortgage. Another view was that a mortgagor who had possession, could lease out the property in the ordinary course of management but he had no right to lease the property on unusual terms

or giving lessee a different mode of enjoyment. These different views created difficulty because the law was uncertain. This necessitated a definite and uniform statutory law and, this section was included in the Act.

Under Section 65-A, a mortgagor has right to lease out the mortgaged property in his possession subject to certain conditions. The conditions are given in clause (2) of this section.

Conditions for lease of mortgaged property.—(1) The lease should be made in such a way as it is made in ordinary course of management of property and according to the local laws and customs. The purpose of this condition is to restrict a mortgagor from leasing out in some abnormal way which may endanger the security of the mortgage. Thus, the mortgagor is entitled to execute the lease of mortgaged property but it should not give an impression that it is being made with *mala fide* intention. The burden of proof lies on the lessee that lease was made in the usual course of management and in accordance with the law and custom.

The two requirements (i) the lease should be made in usual course of management of property and, (ii) in accordance with law and custom or usage, must be fulfilled together. They are not alternative of one another. Therefore, for the validity of lease, both these requirements must be proved together.

(2) The second condition is that no rent shall be paid in advance and that no premium (lump sum amount of rent) shall be promised or paid by the lessee. The fact that lessee had already paid the rent for the coming three years cannot be a valid defence in a suit for ejectment by mortgagee.

(3) The lease should not contain any provision for its renewal. Provision for renewal of lease may have the effect of materially diminishing the security. If the lease-deed contains provision for renewal to the lease, it is not binding on the mortgagee.

(4) The lease should be made to take effect from a date not later than six months from the date on which it was executed. In the absence of this condition, the mortgagor would be free to execute a lease and make it effective from, say, after several years from the date of its execution. Such situation would mean that mortgagee's security is made dependent on the expiry of an unreasonable period of lease. The mortgagee's interest may, thus, be greatly affected.

(5) The last condition is that where mortgaged property is a building, the term of the lease cannot be more than three years. It is also necessary that lease must provide for payment of rent regularly and in the event of non-payment of rent within specified date the lessor (mortgagor) would resume possession i.e. terminate the lease.

Where the lease is made without fulfilling any of these conditions, the mortgagee is not bound by that lease. Clause (3) of this section saves the right of the parties to mortgage to contract to the contrary. Parties may contract under the terms of mortgage-deed excluding altogether the mortgagor's power to execute any lease. Accordingly, where the parties stipulate in the mortgage-deed that mortgagor cannot lease out the mortgaged property without the consent of mortgagee any lease granted by mortgagor would be a breach of the stipulation.

66. Waste by mortgagor in possession.—A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate, but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

SYNOPSIS

- Mortgagor's liability for waste.
- What is insufficient security?
- Not liable for waste by omission.

MORTGAGOR'S LIABILITY FOR WASTE

Section 66 imposes a liability on mortgagor not to do anything which is destructive or injurious to the mortgaged property. It is a common sense rule that mortgagor who advances loan on security of mortgaged property, would not allow mortgagor to commit an act which makes this security insufficient or destroys it altogether so that his return of money becomes difficult. What this section provides is that mortgagee should not actively do anything on property in his possession or deal with it in such a manner which reduces the market value of mortgaged property. The prohibition is, therefore, in respect of any active waste by the mortgagor. His duty is not to waste the mortgaged property deliberately. Following acts by mortgagor are regarded as active waste by mortgagor:

- (i) Removal of valuable fixtures from the mortgaged property.
- (ii) Pulling down the mortgaged house and taking the price of the materials.
- (iii) Cutting of timber standing on the mortgaged property. Even if the timber is so ripe and old that if not cut it may fall down or be decayed, still its cutting by mortgagor is active waste.
- (iv) Minings under the mortgaged buildings so as to put the building in danger.
- (v) Working new mines on the mortgaged property.

The above-mentioned instances are only some of the acts of mortgagor, which amount to active waste by him. Whether an act is waste or not depends upon the nature and degree of the loss done to the mortgaged property. However, the destruction or deterioration must be (i) substantial (ii) of permanent nature and (iii) renders the security insufficient.

What is insufficient security?—The Explanation to this section provides that security is insufficient unless the value of the mortgaged property exceeds

one-third or if it is a building the value exceeds one-half of the amount due to mortgagee. Thus, whether a particular act of mortgagor is waste or not depends on whether it renders the value of property insufficient or not. And, the standards of value prescribed by this explanation determines whether the security has become insufficient or not. If the act of mortgagor does not render the security insufficient, the act is within mortgagor's competence and is binding on the mortgagee even though it amounts to a destructive or permanently injurious act.²⁸

Where mortgagor commits an act of active waste e.g., cutting of timber, tearing down houses, fixtures and the like, the mortgagee is entitled to maintain an action for damages even though such fixtures may have been placed on the premises by the mortgagor after making of mortgage.²⁹

Not liable for waste by omission.—This section does not say that mortgagor should do something positive to avoid waste or deterioration of the mortgaged property. Rather, it says that mortgagor is not liable to the mortgagee if the mortgaged property is in itself being deteriorated. Therefore, under this section the mortgagor is not liable for what is known as 'permissible waste' under English law. Permissive waste means a waste which mortgagor permits actively. Waste by omission is a waste which is caused by his negligence. Mortgagor is liable only for any active waste. Under this section, a mortgagor in possession is not liable for his omission to repair the property. He is also not expected to prevent natural waste or deterioration of mortgaged property. He is liable only where it could be shown that he has actively done some act which injuriously affects the mortgaged property. The onus lies on the mortgagor or his representatives to prove that his act was lawful and that the security was not rendered insufficient.

RIGHTS AND LIABILITIES OF MORTGAGEE

67. Right to foreclosure or sale.—In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous

mortgage by terms of which he is entitled to foreclosure, to institute a suit for foreclosure, or an usufructuary mortgage as such or a mortgage by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgage rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

SYNOPSIS

- Rights of the Mortgagee.
- Right of foreclosure.
- Modes of foreclosure.
- Simple mortgage.
- Usufructuary mortgage.
- Mortgage by conditional sale.
- English mortgage.
- Mortgage by deposit of title-deeds.
- Anomalous Mortgage.
- Mortgagor as trustee for mortgagee.
- Mortgage of Public Works.
- Partial foreclosure or sale.

RIGHTS AND LIABILITIES OF MORTGAGEE

Rights and liabilities of mortgagor have been given in Sections 60 to 66 of the Transfer of Property Act. Mortgagee also has certain rights and liabilities. Mortgagee's rights and liabilities are given from Sections 67 to 77 of this Act.

Rights of Mortgagee.—Mortgagee is the person who advances loan to the mortgagor on security of an immovable property or by possession of title-deeds. The security is taken with a view to secure the recovery of the loan. It is the basic right of every mortgagee to recover back his money with interest. If the mortgagor fails to pay it within stipulated date, the mortgagee has a right to

28. *Mallappa v. Srinappa*, AIR 1950 Bom. 71.

29. *Aiyappa Reddi v. Kuppusami Reddi*, 28 Mad. 208.

recover the money from out of the security. The Transfer of Property Act gives following rights to the mortgagee to recover his money:—

- (i) Right to foreclosure or sale (Section 67).
- (ii) Right to sue for the mortgage-money (Section 68).
- (iii) Right to exercise power of sale, if given (Section 69).
- (iv) Right to have a receiver appointed if power of sale is exercised (Section 69-A).
- (v) Right to appropriate the accession to the mortgaged property (Section 70).
- (vi) Right to get benefit of renewed lease if mortgaged-property is leasehold (Section 71).
- (vii) Right to spend money in preserving the mortgaged-property, if it is in possession of the mortgagee (Section 72).
- (viii) Right to take the proceeds of revenue sale or compensation on acquisition of the mortgaged-property (Section 73).

The above-mentioned rights are the remedies available to the mortgagee in case of non-payment of the loan advanced by him.

Right of Foreclosure

Section 67 of the Act gives to the mortgagee a right of foreclosure or sale, just as Section 60 provides a statutory right to mortgagor to redeem the mortgage, this section confers statutory right on mortgagee to foreclose the mortgage. Foreclosure means closing or withdrawing the mortgagor's right of redemption. 'Foreclosure' is a legal term which means that equitable relief given to mortgagor against forfeiture of the security is withdrawn.³⁰ In the transaction of mortgage, mortgagor's interest is to get back his property after payment of the money whereas, mortgagee's interest is to get back his money if it is not paid by mortgagor. Mortgagor exercises his right of redemption. Mortgagee is entitled to get back his money under the right of foreclosure or sale. In this sense, the right of foreclosure is counterpart of the right of redemption.

There is an important difference between right of redemption and the right of foreclosure. Mortgagor's right of redemption is an absolute right. Even the mortgagor himself is not allowed to limit his right of redemption by any contract. But, mortgagee's right of foreclosure or sale is not an absolute right. It is subject to a contrary contract between the parties. Section 67 starts with the sentence, 'in the absence of a contract to the contrary'. Therefore, a mortgagee if he so likes, may limit his right of foreclosure by any such contract included in the deed of mortgage. The reason behind this distinction is that a borrower who

takes loan in urgent need mortgages his valuable property, always needs protection. Whereas, mortgagee being money-lender, who is in a position of exploiting the borrower, needs no such protection. He may, by mercy or showing his good conduct, agree to curtail his right of foreclosure giving certain facilities to the mortgagor.

When does this right arise?—The right of foreclosure or sale arises when the mortgage-money becomes due. Section 67 provides that mortgagee has right of foreclosure of the mortgage "at any time after the mortgage-money has become due to him, and before a decree has been made for redemption of the mortgaged property..." Just as a mortgagor has no right to redeem the mortgage before the date on which mortgage-money has become due, the mortgagee too has no right to foreclose the mortgage before mortgage-money becomes due. However, since Section 67 is 'in the absence of contract to the contrary', therefore, the parties are free to agree for the foreclosure on any other date. Accordingly, under this section the right of foreclosure arises any time after the date when mortgage-money becomes due unless any contrary intention is expressed in the terms of the mortgage-deed. But this 'any time after mortgage money becomes due' must be before redemption of mortgage. It may be said, therefore, that right of foreclosure can be exercised any time after the mortgaged-money becomes due but before mortgagor's right of redemption.

Section 67 does not lay down as to when the mortgage-money becomes due. Such date is normally fixed in the mortgage-deed. When no time is fixed, the mortgage-money becomes payable on the date of execution. Where the money is payable on demand and no time for payment is fixed, the mortgage-money is deemed to be payable forthwith from the date of execution of the mortgage; no previous demand is necessary by mortgagee.³¹

Modes of Foreclosure.—Section 67 provides following two remedies to a mortgagee:

- (i) Foreclosure, and
- (ii) Sale.

These two remedies are available to the mortgagee in different forms of mortgage. Which mode may be applied by mortgagee depends upon the form of mortgage. Therefore, the specific remedy available to mortgagee is dealt with separately.

Simple mortgage.—In a simple mortgage the mortgagee has to file a suit for sale of mortgaged property. He cannot foreclose. In simple mortgage, there is a personal covenant by mortgagor to repay the loan on security of the mortgaged property. The property remains in the possession of mortgagor. The remedies open to a simple mortgagee are, therefore, twofold:

31. *Borthakur v. Mahboob Ali*, (1920) 42 All. 70; 52 I.C. 684; *S. Nazari, Ad v. State Bank of Mysore*, AIR 2007 SC 959; (2007) 11 SCC 75, enforcement of mortgage security by lender, the proper mode is to file a suit for sale of mortgaged property. Seeking execution of the mortgage security in a suit for recovery of loan could not be efficacious.

- (1) he may sue the mortgagor personally and get a simple money decree ;
or
(ii) he may file a suit for the sale of mortgaged property so as to recover the money from proceeds of the sale.

Suit for the sale of mortgaged property and suit for obtaining simple money decree against the mortgagee are two independent remedies available to a simple mortgagee. He may file two separate suits for each or, may file only one suit for both.

Usufructuary mortgage.—In usufructuary mortgage the possession of the mortgaged property is already with mortgagee. Interest or interest plus loan both are to be realised by him from out of the mortgaged property. The usufructuary mortgagee, therefore, can neither sue for sale nor foreclose the mortgage. He is entitled to continue the possession and continue to take the rents and profits of the property till all the debts are recovered.

However, if a date is fixed for repayment of the principal money or balance of the whole mortgage-money, the mortgagee is entitled to bring a suit for sale.³² But, in this situation the mortgage is not purely usufructuary mortgage. It becomes 'simple mortgage usufructuary' which is in the category of an anomalous mortgage.

Mortgage by conditional sale.—The proper remedy in a mortgage by conditional sale is a suit for foreclosure. In a mortgage by conditional sale, the condition of the mortgage itself provides that in default of payment on the stipulated date the mortgage shall become sale in favour of mortgagee. Accordingly, after the due date the mortgage works out as a sale of mortgaged property and mortgagee becomes owner of the property in satisfaction of the debt. Thus, in a mortgage by conditional sale, the appropriate remedy for the mortgagee is to deprive the mortgagor from redeeming the mortgage. This he can do only by filing a suit for the foreclosure of mortgage. There is no need of suit for sale.

English mortgage.—An English mortgagee can file a suit for sale of the mortgaged property. Before amendment of this section in 1929, an English mortgagee could either sue for sale or file a suit for the foreclosure. Now he is entitled only to sue for sale.

Mortgage by deposit of title-deeds.—Section 96 of this Act puts mortgage by deposit of title-deeds on the same footing as a simple mortgage. Therefore, in a mortgage by deposit of title deeds which is also called equitable mortgage, the mortgagee's remedy is a suit for the sale of property.

Anomalous Mortgage.—Anomalous mortgage is a combination of two or more forms of mortgages. Therefore, remedy for the mortgagee in an anomalous mortgage is to be laid down in the deed itself. Where it is a simple mortgage usufructuary, the remedy is a suit for sale. If it is usufructuary mortgage by conditional sale, the mortgagee is entitled to bring a suit for foreclosure. But, in

anomalous mortgage, the tendency of the Court has been not to give relief of foreclosure to the mortgagee even if he is entitled for it. The Courts are empowered to exercise their discretion in passing an appropriate decree under Order 34, Rule 4(3) of the Civil Procedure Code. So, the Court may pass a decree for sale instead of decree for the foreclosure.

Mortgagor as Trustee for mortgagee.—In certain cases, the mortgagor may act as trustee of the mortgagee. Where mortgagor is trustee of the mortgagee, the proper remedy is not foreclosure. Section 67 (b) prohibits a mortgagor who is trustee of mortgagee from filing a suit for foreclosure. The proper remedy is a suit for the sale of mortgaged property. The reason behind this prohibition is that if mortgagor is allowed to foreclose, he would have to acquire the property for his own benefit whereas as trustee his duty is to preserve that property. This would be against the very concept of a trust.

Mortgagee of Public Works.—There is an absolute prohibition on foreclosure or sale for a mortgagee of Railways, Canals or other works of public service. Therefore, where the mortgagor is Railway etc. the mortgagee cannot foreclose or sale. The proper remedy for him is appointment of receiver to realise the earning of these undertakings so as to discharge the debt.

Partial Foreclosure or Sale.—Section 67 (d) prohibits partial foreclosure or sale. This clause is similar to the last clause of Section 60 which prohibits partial redemption. The basis of the rule against partial foreclosure is also the principle of indivisibility of mortgage-security as it is in the case of partial redemption.

Section 67 (d) provides that if there are two or more mortgagees then, any one of these several mortgagees cannot foreclose or sell in respect of his own share. He is entitled to foreclose or sell his own share only if several mortgagees have separated their shares with the consent of mortgagor. Reason behind prohibition on partial foreclosure is to provide protection to the mortgagor from multiplicity of suits being filed by several mortgagees separately. It is to be noted that mortgagor's consent is necessary for partial foreclosure. If the consent of mortgagor is not obtained, any one of the mortgagee cannot separate his share and cannot enforce foreclosure. In the absence of mortgagor's consent, all the mortgagees must join together and file a single suit foreclosing the mortgage. In other words, without mortgagor's consent the whole mortgage-money must be claimed jointly by all the co-mortgagees. But, if mortgagees too are more than one e.g., they are different persons as legal heirs of the deceased mortgagor, partial foreclosure with the consent of any of the mortgagee would not be possible. In such cases, partition of the equity of redemption among these several mortgagees (heirs of deceased mortgagor) cannot itself effect severance or division of the mortgages. Therefore, in case the equity of redemption is partitioned among the several heirs of mortgagor, a suit for partial foreclosure or sale is not justified.³³

32. *Ramayya v. Gurunni*, 14 Mad. 232; *Elakurthi v. Kidambinil*, AIR 1929 Cal. 304.

33. *Sati Surni v. Thian Singh*, AIR 1922 All. 352.

67-A. Mortgagee when bound to bring one suit on several mortgages.—A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of which he has a right to obtain the same kind of decree under Section 67, and who sues in absence of a contract on any one of the mortgages shall, in the mortgages in respect of the contrary, be bound to sue on all the due.

MORTGAGEE BOUND TO CONSOLIDATE

This section was introduced by the Amending Act of 1929. It provides for mortgagee's duty to consolidate the enforcement of all mortgages where there are more than one. This is opposite of Section 61 which makes rule against consolidation of mortgages when mortgagor redeems two or more of them.

Section 67-A provides that a mortgagee, having successive mortgages of the same property or different mortgages from the same mortgagor, is bound to foreclose all of them together. He is not allowed to enforce any one of such mortgages alone unless contrary intention is expressed in a contract. This provision incorporates an equitable rule for the benefit of mortgagor. Where mortgagor makes two or more mortgages on the same property it would create hardship for him to have sold his property twice or thrice at each foreclosure or sale. Similarly, where the mortgagor mortgages different properties to the same mortgagee, the mortgagee's interest would be in danger if mortgagee forecloses a valuable property first, leaving others. In order to protect mortgagor from such hardships, Section 67-A now provides that in such cases, subject to any contract to the contrary, the mortgagee must enforce all the mortgages or none.

Under this section, a mortgagee is bound to consolidate two or more mortgages together only when the mortgagor is the same person. If the mortgagors are different persons, the mortgagee has no duty to enforce the mortgages together. Where a husband and wife own their respective properties separately and mortgage separately and jointly, it was held that a suit to enforce the joint mortgage does not bar a separate suit by either.³⁴ However, this section is applicable subject to any contract to the contrary. Therefore, if there is any contract in the mortgage-deed permitting mortgagee to enforce any of the two mortgages separately. In *United Bank of India v. Sivas Kumar Roy*,³⁵ a bank had given loans on mortgages. The terms of the mortgage-deed indicated that parties had agreed that mortgagee could sue on any one of the mortgages executed by the debtor (mortgagor). The bank enforced one of the mortgages to recover the money. It was held by the Calcutta High Court that since the mortgage-deed itself had given right to the bank to enforce any one mortgage

5. 68] alone and Section 67-A was subject to a contract to contrary, the suit to enforce any one mortgage was valid; it was not hit by Section 67-A.

The provisions of this section are based on equitable rule providing benefit to the mortgagor. The object is to give benefit to a mortgagor. The mortgagor is, therefore, allowed to waive or refuse to take this benefit if he so likes. Such waiver may be inferred by his failure to make objections in any suit filed by the mortgagee for enforcing any one mortgage alone.

68. Right to sue for mortgage-money.—(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :—

- (a) where the mortgagor binds himself to repay the same;
- (b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of Section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient and the mortgagor has failed to do so;

- (c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

- (d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor;

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

- (2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until mortgagee has exhausted all its available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.

SYNOPSIS

- Mortgagee's Right to sue for Mortgage-money.
- Personal covenant to pay.

34. *S. Rajagopalaswami v. Bank of Karnataka*, AIR 1971 S.C. 884.

35. (1977) 51 Cal. W.No. 300.

- Where security is destroyed.
- Mortgagee deprived of security due to wrongful act or default of mortgagor.
- Mortgagor's failure to deliver possession.
- Stay of suits and proceedings under Sec. 68 (1) (a) and (b).

MORTGAGEE'S RIGHT TO SUE FOR MORTGAGE-MONEY

Mortgagee's remedy against property is given in Section 67. Section 68 provides remedy against the mortgagor. Under Section 68 a mortgagee has right to sue mortgagor personally for repayment of the mortgage-money. It may be noted that besides right of foreclosure or sale, a mortgagee has also a right to sue mortgagor personally for the mortgage-money. Right to sue for mortgage-money is available to mortgagee in addition to the right of foreclosure or sale but only in certain specified circumstances. The circumstances in which a mortgagee may sue has been specifically mentioned in Section 68. This remedy is available in these cases only and in no others³⁶.

According to Section 68 a mortgagee has right to sue for the mortgage-money in the following cases :—

- (a) Where mortgagor binds himself to repay the mortgage-money.
- (b) Where the mortgaged property is wholly or partly destroyed so as to render the security insufficient without any fault of either party and mortgagor failed to provide further security.
- (c) Where mortgagee is deprived of the whole or part of his security due to wrongful act or default of the mortgagor.
- (d) Where the mortgagee is entitled to have possession of property but mortgagor fails to deliver possession or fails to secure the possession thereof without disturbance by himself or by any other person.

(a) *Personal covenant to pay*.—Clause (a) of this section gives to the mortgagee a right to sue for mortgage-money if there is personal covenant by mortgagor to repay the same. In a mortgage, if mortgagor binds himself to repay the debt personally, it is said that there is a personal covenant by him for its repayment. Section 68(a) is an enabling section. Generally a mortgagee is not entitled to sue personally for the mortgage-money unless there is a personal covenant. The mortgagor must bind himself under a covenant to repay the debt. But such covenant (contract) must be expressed or implied in the mortgage-deed. Where personal liability to repay arises independently of mortgage *e.g.* under a promissory note, this section is not applicable.³⁶

In a simple mortgage, it is implied that mortgagor has bound himself to repay the debt personally. Therefore, a personal covenant to pay the mortgage-money is a normal incident of a simple mortgage. Similarly, in English

mortgage too there is personal covenant to pay because the mortgagor "binds himself to repay the mortgage-money".

In determining whether in a mortgage there is personal covenant to repay, the form of mortgage is not very important. Nature of transaction and terms and conditions included in it decides whether the mortgagor had intended to repay personally. The personal covenant must be clear and unconditional in the undertaking to pay otherwise it cannot entitle the mortgagee to sue. Where deed contains the words, "on the expiry of the term I (mortgagor) shall pay the said Rs..... and redeem the land", there is a personal covenant by the mortgagor. Similarly, where the deed provides that "the mortgagees shall be competent to recover the amount in any way they like", there is a personal covenant by mortgagor.

The personal covenants stand apart from the mortgage. Therefore, if a mortgage is invalid for want of registration or attestation, a personal covenant is not affected. Where the mortgage is invalid but there is a personal covenant for repayment of loan, the mortgagee can still sue making 'invalid mortgage-deed as evidence for the existence of debt'.³⁷

As laid down in the proviso to Section 68 (1), a transferee from the mortgagor or from his legal representative is not liable under such personal covenant. Therefore, he cannot be sued for the mortgage-money under this clause.

(b) *Where security is destroyed*.—Under this clause mortgagee has a right to sue for the mortgage-money when the security (mortgaged-property) is destroyed or is rendered insufficient due to accidental events. Such accidental events are not due to any wrongful act or omission of the mortgagor or mortgagee. The right to sue under this clause arises under a circumstance beyond the control of the parties, it is not dependent on mortgage-money becoming due. Therefore, even before mortgage-money becomes due, if the accidental events happen and destroy the mortgaged property, the mortgagee gets a right to sue for the mortgage-money. Mortgagee has right to sue (i) even if there is no personal covenant and (ii) even if the repayment of mortgage-money has not become due. The reason is that, where the property is destroyed in accidents *e.g.* fire or earthquake etc. The mortgagee's security for repayment of loan as such is destroyed. How then he can get back his money from the property in case mortgagor does not repay the same? Because of this reason, the mortgagee need not wait for the date on which repayment becomes due nor he should be denied the right to sue because there is no personal covenant.

The personal remedy given to mortgagee under this clause is in the nature of a suit for 'compensation'. Where mortgaged property is destroyed, he must be compensated with some other security in the absence of which he must be entitled to sue mortgagor personally. In the event of destruction or devaluation of property accidentally, the mortgagee is deprived of his 'security'. Therefore, if in such a circumstance, the mortgagee must ask the mortgagor to furnish

36. *Puddepp Chund Lall v. Grindlays Bank Ltd.* A.I.R. 1987 Cal 157.

37. *Krishnaswami v. Kannanamma*, (1942) Mad. 82.

another security. If the mortgagor fails to furnish another 'security', as compensation of the first then, the mortgagee gets right to sue for the mortgage-money.

The destruction or devaluation of property due to accidents or natural causes e.g. fire, floods etc. should be to such extent which renders the security 'insufficient' as defined in Section 66 of this Act. That is to say, if it is a value becomes less than one-half and if it is some other property it is another security required to be furnished by mortgagor must be exceeding one-half or one third, as the case may be.

(c) *Mortgagee deprived of security due to wrongful act or default of mortgagor.*—The mortgagee is entitled to sue for mortgage-money also when the property is lost wholly or partially due to wrongful act or omission of the mortgagor. This clause contemplates a situation where the mortgaged-property is lost, destroyed or is devalued due to any deliberate act or negligent omission of the mortgagor. The mortgagee has, therefore, no remedy if the loss or damage is caused by mortgagee himself.

The loss or damage caused to the property by mortgagor amounts to loss of mortgagee's security. Any breach of duty imposed upon mortgagor under Section 65 may be regarded as wrongful omission or default of mortgagor. This would give right to mortgagee to sue mortgagor personally under this clause.

But, if the mortgagee is deprived of the security due to his own fault, he is not entitled to sue under this clause. For example, if the mortgaged property is in possession of the mortgagee and is sold for arrears of revenue because mortgagee did not pay the revenue due, the loss of security is by mortgagee's own negligence. He cannot claim a right to sue the mortgagor personally.

(d) *Mortgagor's failure to deliver possession.*—In a usufructuary mortgage the mortgagee is entitled to take possession of the mortgaged-property and is also entitled to enjoy its benefits. The mortgagor, therefore, must deliver the possession to him. Where, mortgagor fails to deliver the possession of property to mortgagee as required under the deed, the mortgagee, under this clause has a right to sue for mortgage-money. If the mortgagee is entitled to have possession of property, he is entitled also to continue the possession without any disturbance from mortgagor or his representatives. The mortgagor is also entitled not to be dispossessed from the property. Therefore, if mortgagor or his representatives either interfere in mortgagee's quiet enjoyment of property or dispossess him from the property, the mortgagee has right to sue mortgagor personally for the mortgage-money. However, under this clause, mortgagee cannot sue mortgagor for mortgage-money if he is dispossessed by a trespasser. He can sue only, against the trespasser for obtaining the possession.

The mortgagee may sue for mortgage-money also when having obtained possession, he is subsequently dispossessed by mortgagor or, his co-sharer or his representative or by any person having better title. If he is being dispossessed or

being deprived of his security in any other form, he can sue only the mortgagor. But, if he is dispossessed or being deprived of his security by persons other than mentioned for the mortgage-money. Where the tenant of the mortgage-property refuses to pay the rents to mortgagee in possession of that property, the mortgagee cannot sue mortgagor. He has to sue the tenant.

A significant point in respect of mortgagee's right to sue for mortgage-money is that it is an alternative remedy for usufructuary mortgage. Instead of suing for the mortgage-money, the mortgagee may file a suit against mortgagor for obtaining possession of property.

Suit for enforcement of Mortgage by Sale.—A suit for enforcement of mortgage by sale has been held to be enforcement of a right *in rem*. Such suit can be tried by a Civil Court and not by an arbitral tribunal. Reference to arbitration was held to be not tenable.^{37a}

Stay of suits and proceedings under Sec. 68 (1) (a) and (b).—Clause (2) of Section 68 provides for stay of all suits and proceedings filed by mortgagee on personal covenants or, in case of destruction of mortgaged property rendering the security insufficient. This clause lays down that Court at its discretion may stay mortgagee's suit for mortgage-money until mortgagee had already exhausted all other remedies against the property. In other words, the Court is empowered to require the mortgagee to first avail his remedies against property. If he fails to recover all his debts through property then only he may be allowed to file suit against mortgagee personally. But, such stay of suits or proceedings instituted by mortgagee may be made only where the suit is filed claiming mortgage-money under clauses (1) (a) and (b) of this section.

For stay of suit or proceedings under this clause, the suit must be filed by mortgagee in the capacity of mortgagee and in no other capacity. Where the mortgagor binds himself personally independently of the mortgage e.g. under a promissory note, then he does not come within the scope of this clause. In such cases the suit cannot be stayed by the Court. A mortgagor cannot deny the mortgage and at the same time invoke the discretionary relief of staying mortgagee's suit under sub-section (2).³⁸

69. Power of sale when valid.—(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money without the intervention of the Court, in the following cases and in no others, namely:—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist, or a member of any other race,

^{37a} *Boaz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, AIR 2011 SC 2507.
³⁸ *Nityamond v. Rajpur C.B. Chinnai Ltd.*, AIR 1953 Cal 208.

sect, tribe or class from time to time specified in this behalf by the State Government, in the official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof, was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay or in any other town or area which the State Government may, by notification in the official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until—

- (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors and default has been made in payment of the principal, or of part thereof, or three months after such service; or
- (b) some interest under the mortgage amounting at least to five hundred rupees, is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power the title of the purchase shall not be impeachable on the ground that no case had arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised or improper or irregular exercise of the power shall have remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into Court under Section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in Section 69-A applies to power conferred before the first day of July, 1882.

SYNOPSIS

- Power of sale without intervention of the court.
- When mortgagee may exercise power of Sale?
- Who may exercise power of sale?
- Conditions for the exercise of power of sale.
- How the sale may be made?
- Effect of sale.
- Appropriation of sale proceeds.
- Purchaser's interest protected.
- Remedy of the mortgagor.

POWER OF SALE WITHOUT INTERVENTION OF COURT

This section provides for sale of mortgaged property by mortgagee without intervention of the Court. The mortgagee has a right to realise the mortgage-money (debt) by causing sale of the mortgaged property. Under Sections 67 and 68 of the Act the mortgaged-property may be sold for recovery of the debt by intervention of Court. The mortgagee thus causes the sale through Court. Section 69 provides rules relating to sale of the property privately i.e. without help of the Court. Under this section, the mortgagee himself is entitled to effect the sale (a) in certain cases and (b) under the conditions laid down in this section.

When mortgagee may exercise power of Sale—The mortgagee may exercise the power of sale of mortgaged-property privately i.e. without Court's intervention in any of the following cases—

- (a) Where the mortgage is an English mortgage and neither of the parties is a Hindu, Muslim or Buddhist or a member of any other race, sect, tribe or class to be specified from time to time by the State Government. It is to be noted that power of sale in this case is always deemed to be implied. It is not necessary that such power be expressly given in the deed. However, the Andhra Pradesh High Court has held that Section 69 may be applied to an English mortgage where one party is company and the other are trustee some of whom being Hindus.³⁹
- (b) Where the mortgagee is Government and power of sale without Court has expressly been conferred on the mortgagee.
- (c) Where the mortgaged-property or any part thereof is situated within the towns of Calcutta, Madras, Bombay or any other area which the State Government may by notification specify and the power of sale is expressly given in the deed.

39: *L.V. Apple v. R.G.N. Price*, A.I.R. 1962 Andh. P. 274.

Who may exercise power of sale.—In the above-mentioned cases, the power of sale without intervention of Court is exercised, by the mortgagee. Mortgagee here means and includes also his assignees or transferees. Therefore, in a sub-mortgage, the power of sale may be exercised by sub-mortgagee, authorised to do so. Similarly, an agent or mortgagee may also effect the sale if person acting on his behalf means any person who has been given authority to recover the mortgage-money. Thus, not only the assignee (transferee) of mortgage-money, may sell the property under this section. If there are two or more mortgagees e.g. they are partners, the power of sale must be exercised by all unless otherwise mentioned in the deed.

Conditions for exercise of power of sale.—The power of sale without intervention of Court may be exercised subject to certain conditions laid down in sub-section (2). These conditions are statutory and cannot be changed or modified by the parties through any mutual agreement. The conditions are as follows:—

(a) The power of sale can be exercised only when default in payment of mortgage-money is made. When no due date for payment is fixed, there is no default until demand for payment has been made. The default in payment may be in respect of principal money or of interest or of both.

The power of sale must be exercised only after giving three months' notice to the mortgagee. The notice must be in writing. If the power is exercised without giving notice, it may be regarded as harassment of mortgagee. This may also amount to an attempt to extinguish mortgagee's equity of redemption. The requirement of giving notice is statutory requirement and the power of sale cannot be exercised without three months' notice. Being a statutory requirement, the duration of three months' notice cannot be curtailed even by the parties. For example, it cannot be reduced to one month's notice. However, after expiry of three months from the date of issue of notice, the power of sale may be exercised any time by the mortgagee. It is not necessary that mortgagee should exercise this power immediately after expiry of three months. The mere fact of delay in exercising power of sale does not require any fresh notice.

The notice for sale of mortgage-property should be given to the mortgagee. Where there are more than one mortgagee, it may be given to any one of them who would act as agent for others. But, in case there is fraud or notice of sale is deliberately concealed from the other mortgagees, the requirement of notice is not deemed to have been fulfilled. It would be injustice to a mortgagee who finds that property has been sold without any notice to him as required under this section.

(b) Where default is made in respect of payment of interest, the power of sale can be exercised only if the amount is at least Rs. 500/- and it remains unpaid for at least three months. It is significant to note that notice is not necessary when default is made in payment of interest. It is sufficient if the amount of interest is at least Rs. 500/- and is due for three months. If it is so, the

S. 69] power of sale may be exercised any time without notice before expiry of the period of redemption.⁴⁰

How the sale may be made.—Under Section 69 the mortgagee may sell the mortgage-property either by private contract or by public auction. This section does not provide for any specific mode of sale. Mortgagee is therefore not bound to put the property first to public auction and then to sell it individually. However, the mortgagee must sell the property with a *bona fide* intention. *Bona fide* intention here means that he would look his interest and also the interest of the mortgagee. So, all that is required is that he would not sell the property deliberately in such a manner as to cause harm to mortgagee. In *Kennedy v. De Trafford* Lord Lindley observed thus:

"A mortgagee is not a trustee of a power of sale for the mortgagee at all; his right is to look after himself first. But he is not at liberty to look after his own interest alone and it is not right, or proper or legal for him either fraudulently or wrongfully or recklessly to sacrifice the property of the mortgagee."

If the mortgagee sells the property by public auction, there must be a reasonable publicity of the sale. Where he sells it by private treaty (contract) he need to advertise the sale. A sale cannot be declared invalid only on the ground of undervaluation. But, if it is shown that the property was sold at much cheaper price fraudulently, the intention of mortgagee is not *bona fide* and sale may be set aside by the Court. The mortgagee may sell the property at such a price which gives back only his money though its market value is much higher. Such sale would definitely put the mortgagee at great loss. The Court may, in such situations, set aside the sale.

In no case, the mortgagee himself would purchase the property. He cannot purchase the property either himself or together with other persons or through his agent.

Effect of Sale.—When the mortgagee exercises power of sale under this section, the very first effect of such sale is that mortgagee's right of redemption is extinguished. As soon as the sale is complete in accordance with provisions of this section, mortgagee's right of redemption is lost. In *Rajesh Kishendatta Ram v. Rajat Muniaz Ali Khan* the Privy Council observed, "The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power of trustee of the surplus (sale) and proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagee."

But, the mortgagee's equity of redemption is lost only after the completion of sale. A contract for the sale of property does not extinguish the equity of

40. *A.C. Kalia v. Bala Rameshwar*, (1918) 43 I.C. 921; *N.P. Pushpangadam v. Federal Bank of India*, AIR 1932 Ker. 27; this power is being exercised under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI Act). The non-obstante clause in the section specifically mentions Sections 49 and 69-A of T.P. Act. (1979) A.C. 180 at p. 185.

41. (1979) 6 L.A. 145.

redemption. Similarly, where the mortgagee chooses to sell the property by auction, the sale is deemed to be complete only after all formalities in respect of transfer of ownership to purchaser are completed. Therefore, merely putting the property to auction does not destroy the mortgagor's right of redemption.⁴³

Appropriation of sale proceeds.—Sub-section (4) deals with appropriation of sale proceeds. In other words, it lays down as to how the money is to be applied. When the mortgaged-property is sold under this section, the mortgagee has to apply the sale-proceeds in the following order:—

- (i) Discharge of prior incumbrances. Prior incumbrances means liabilities or charges on the property before the sale. Such liabilities, if any, are discharged first.
- (ii) After discharge of prior incumbrances, the next payment from the sale proceeds is payment of costs and expenditure incurred in making the sale.
- (iii) The amount which remains after the above-mentioned payments, is applied for the discharge of mortgage-money. That is to say, the residue of the sale proceeds after discharge of prior liabilities and costs of making sale, is taken by the mortgagee.
- (iv) The surplus, if any, ultimately goes to mortgagor. Since, the mortgagor whose property is sold, is the ultimate person to get whatever amount remains in the end, the mortgagee is supposed to be trustee for the mortgagor.

Purchaser's interest protected.—The interest of purchaser of the mortgaged property has been protected. Section 69 (3) provides that when a sale is made under this section, the title of purchaser is not affected on the ground of any irregularity in exercise of power of sale. Thus, the purchaser's title shall not be impeached or avoided if the sale was made without due notice or that the power was improperly exercised. Not only the irregularity in exercise of power but, also want of power of sale shall not affect the purchaser's title. For example, the purchaser gets a good title even though the mortgagee has been paid off at the time of sale.⁴⁴ The words, "professed exercise of such power" in sub-section (3) carry the same meaning. But, this does not include a case where mortgagee has no power of sale without intervention of Court. In other words, the irregularity or want of power of sale is with reference to Section 69 and not in other cases. However, for getting protection under this sub-section, it is necessary that purchaser must be an innocent person *i.e.*, he has no notice of the irregularity or want of power of sale *etc.*

Remedy of mortgagor.—Where the mortgagee sells the mortgaged property improperly, the only remedy of mortgagor is to claim damages from the mortgagee. But, the mortgagor himself must be innocent *i.e.*, he should have no notice of such irregularity or want of power of sale. Knowledge of such irregularity amounts to fraud. Where the mortgagee sold the property not only due under an English mortgage but also for money due under a subsequent

mortgage by deposit of title deeds, the sale was held valid but mortgagor was entitled to claim damages from the mortgagee.⁴⁵

69-A Appointment of receiver.—(1) A mortgagee having the right to exercise a power of sale under Section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing, signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgaged-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to be improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all

43. *Narasimha Koteswara v. S.A. Kampani*, A.I.R. 1977 S.C. 774.

44. *Diller v. Augerstein*, (1876) 3 Ch. D. 600 cited in *Mulla's Transfer of Property Act Ed. VII* (reprint 1990) p. 490.

45. *Rambhadrappa v. Official Assignee*, A.I.R. 1972 Mad. 390.

costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five percent on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five percent on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely—

- (i) in discharges of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
- (ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;
- (iii) in payment of his commission, and of the premiums of fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- (iv) in payment of the interest falling due under the mortgage;
- (v) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed, and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variation or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present

question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.

SYNOPSIS

- Appointment of Receiver of Income.
- Position of receiver.
- Remuneration of receiver.

APPOINTMENT OF RECEIVER OF INCOME

The mortgaged-property belongs to mortgagor who takes loan from mortgagee on security of this property. The mortgagee has right to recover his money from this 'security' in case of default. But, since the mortgaged property primarily belongs to mortgagor, he has every right to see that his property is dealt with by mortgagee in an impartial way. Therefore, when the mortgaged property is in possession of mortgagee or when the mortgagee sells the property under Section 69, the mortgagor may appoint a receiver to look after the conduct of the mortgage. The receiver is appointed especially to look the income of the mortgaged-property when sold by mortgagee. In England, the receivers were appointed to look after the proper management of mortgaged property in possession of the mortgagee.

Later on, the mortgagee himself appointed receivers on behalf of the mortgagor. The receivers so appointed were treated as an agent of the mortgagor. Gradually, the practice of appointing receivers became so popular in England that it found place in the Trustees and Mortgagees Act 1860. In India, the provision of appointing receivers in the case of sale of mortgaged-property under Section 69 was also found necessary to protect the interest of mortgagor. Accordingly, this provision was added by the Amending Act of 1929.

Appointment of Receiver.—This section provides for the appointment of receiver in all such cases where power of sale is given to mortgagee under Section 69. Thus, the power of sale by mortgagee and appointment of a receiver, go together. Under this section a receiver may be appointed in any of the following manner:—

- (a) The receiver may be appointed by the mortgagor himself by nominating a person to act as receiver. However, it is necessary that

such person is named in the mortgage-deed and he gives his consent to act as receiver.

- (b) Receiver may be appointed also by mortgagee if—
- (i) all persons nominated by mortgagor are dead or,
 - (ii) all persons nominated by mortgagor have refused to act as receiver.

Since mortgagee appoints a receiver on behalf of mortgagor, therefore, the mortgagor's consent is necessary. Appointment of receiver is possible only where mortgagor and mortgagee both agree to nominate a particular person as receiver.

- (c) The receiver may be appointed by Court if it could not be appointed by mortgagor or mortgagee. If mortgagor does not agree on the name given by mortgagee, he may apply to the Court for nominating a suitable receiver. The person appointed by Court shall be deemed to have been appointed by mortgagee.

Receiver may be removed any time by writing signed by or on behalf of mortgagor and mortgagee. A receiver may also be removed by Court on application made by either party showing reasons for his removal. When removed, the office of receiver becomes vacant. In that case, another receiver may be appointed by any one of the above-mentioned methods.

Position of Receiver.—Receiver appointed under this section acts as an agent of the mortgagor. Generally such agent is appointed to look after the income of the mortgaged property. Unless the mortgage-deed otherwise provides, the mortgagor is liable for all the acts or omissions of the receiver. Although a receiver acts as an agent of the mortgagor, he is accountable not to mortgagor but to mortgagee. It is significant to note that when receiver is appointed, the mortgagee is in a beneficial position because he is entitled to get income through the receiver but is not liable to look after the management of property or to maintain any account.

Receiver has power to get the mortgaged property insured against fire and to make necessary repairs when so directed. Repairs done by receiver without any written authority by mortgagor are not to be included in mortgagee's account. The money received under insurance, if any, are to be applied by him either in restoring the property or, in reduction of the debt.

Subject to provisions regarding application of insurance money, the receiver has a duty to apply all money received by him as under :—

- (i) In discharge of all rents, taxes, land revenue and other outgoings affecting the mortgaged property.
- (ii) In keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgage for which he has been appointed receiver.
- (iii) In payment of his commission or remuneration and of premiums on fire, life or other insurance, if any

- (iv) In payment of the interest falling due under the mortgage.

- (v) In or towards discharge of the principal money, if so directed by the mortgagee in writing.

- (vi) If any residue remains after making abovementioned payments, the receiver has to pay it to such person who would have been entitled to receive the income had receiver not been in possession of the property.

Remuneration of Receiver.—The remuneration or commission of the receiver if specified in the mortgage-deed. But, if it is not so fixed in the deed, sub-section (6) provides that receiver may retain five percent of the gross income for himself as his remuneration. Where a receiver finds that the rate of five percent is less as compared to his duties, he may apply to the Court for enhancement of his remuneration.

If the Court thinks fit, it may allow the receiver to retain, as his remuneration an amount which may exceed five percent of the gross income.

70. Accession to mortgaged property.—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations

- (a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purpose of his security, B is entitled to the increase.
- (b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

MORTGAGEES RIGHT TO ACCESSION

After execution of the mortgage, there might be an addition to the mortgaged property. The addition may either be natural or made by some person. Such additions in the mortgaged property are accessions and become part of the mortgaged property. This section provides that unless there is any contract to the contrary, the accessions to the mortgaged property become part of the security. Therefore, the mortgagee is entitled to it in addition to the original security. For example, A mortgages to B a field situated on the bank of a river. The river changes its course on the other side and leaves behind some land. As a result of it, there is an addition or increase in the area of the field (mortgaged property). Technically, this increase in the area is called alluvion. Under Section 70, for purposes of his security, B (mortgagee) is entitled to this additional area (alluvion). This is an example where the mortgaged property is increased by natural process. Addition to the property may be caused also by human beings. So, where some construction is made by mortgagor on the land

which is on mortgage, the addition would be part of the mortgaged property. The illustration (b) to this section makes it clear. A mortgages to B a plot of land. After the mortgage, A constructs a house on this plot, for purposes of security, the house would be deemed to be a part of the mortgaged property (land). But where only the building is mortgaged and not the land (site) the land cannot be deemed to be an accession.⁴⁶

Section 70 is converse (opposite) of Section 63 which entitled a mortgagor to redeem the mortgaged property together with accessions, if any. As in Section 63, this section too is not limited to accessions which are apparent or visible such as increased area in land or construction. This includes any kind of increase in the value of mortgaged property. For instance, where the mortgaged property is subject to some prior incumbrances, a discharge of such liability shall certainly increase the value of the mortgaged property. Under this section, if the mortgagor discharges prior liabilities on the mortgaged property, the mortgagee shall be entitled to get the benefit of property being free from liabilities.

However, the mortgagee's right to accession is only with reference to or for purposes of only his security not otherwise. Further, the right is subject to any contract to the contrary.

71. Renewal of mortgaged lease.—When the mortgaged property is a lease, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

MORTGAGEE'S RIGHT TO RENEWED MORTGAGED-LEASE

The mortgaged property may be a lease hold property i.e. the mortgagor has taken the property on lease. He can mortgage this leasehold property. Leases are for fixed term and for extension they require its renewal. Such renewal is generally made by the lessee. This section provides that where the mortgaged property is a lease and mortgagor renews that lease, the mortgagee shall be entitled to get the benefit of this renewed lease. However, mortgagee's right to the renewed lease is subject to any contract to the contrary. Thus, if the parties stipulate in the mortgage deed that mortgagee will not get the benefit of renewed lease, the mortgagee is not entitled to such renewal.

Renewal of a lease hold mortgaged property is regarded as an "accession" to the property because it increases the value of mortgagee's security. When an old lease is renewed for a further period, the lessee's right in the property is also increased. In other words, by renewal the mortgagor's own rights in the property are increased or extended. This results in the extension of also mortgagee's right in that property. Accordingly, unless otherwise provided, just as mortgagor gets the benefit of renewed lease under Section 64, the mortgagee too is entitled to get benefit of the renewed 'security' under Section 71. The reason behind this rule is that a renewed lease is treated as a graft upon the

stock of old lease and forms part of the mortgage security. Accordingly, this renewed part of the old lease is also subject to the same equities regarding foreclosure and redemption as the old lease.

72. Rights of mortgagee in possession.—A mortgagee may spend such money as is necessarily—

- (a) * * *
- (b) for the preservation of the mortgaged property from destruction, forfeiture or sale;
- (c) for supporting the mortgagor's title to the property;
- (d) for making his own title thereto good against the mortgagor; and
- (e) when the mortgaged property is a renewable lease hold, for the renewal of the lease;

and may, in absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine percent per annum :

Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine percent, per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure.

SYNOPSIS

- Mortgagee's right to spend money.
- Necessity for spending money.

- Circumstances where expenditure is allowed.
- Preservation of mortgaged-property.
- Defending mortgagor's title.
- Defence of mortgagee's title against mortgagor.
- Renewal of leases.
- Premium for insurance.

MORTGAGEE'S RIGHT TO SPEND MONEY

This section gives a right to the mortgagee to spend money on the mortgaged property. He may spend money for preserving the property. The mortgagee may spend money for keeping the property safe so that it may not be destroyed or devalued. The circumstances under which a mortgagee is entitled to spend money on the mortgaged property, are given in this section. All the circumstances suggest that mortgagee is allowed to spend money only where it is necessary to keep the property intact so that his security also remains intact. Idea behind this right is simple. Mortgagee gives loan to the mortgagor on security of the mortgaged property. In case the mortgagor (debtor) fails to repay the loan, the mortgagee ultimately recovers his money from this property. Therefore, it is obvious that mortgagee must have an interest in the property. If for some reason, it is either destroyed or devalued or does not remain a property of the mortgagor, he (mortgagee) would not be able to recover his money. The basis of the right under Section 72 is the fiction of an implied request by the mortgagor to the mortgagee to spend such money as may be necessary for the protection of his security.⁴⁷

Where a mortgagee spends some money in protecting or otherwise keeping his security safe, he is entitled to add the expenses in the mortgage debt. But, under this section, the mortgagee cannot spend more than what is required or without any necessity for the same. But the mortgagee's right to spend money on mortgaged property is not an absolute right. It is subject to certain conditions. The mortgagee is entitled to spend money only when it is necessary to do so. Further, he can spend money only in certain specified circumstances laid down in this section.

Necessity for Spending Money.—The mortgagee has right to spend money on the mortgaged property only when there is necessity for the same. Whether a necessity exists in the given circumstance or not is a matter of fact. Necessity for expenditure as well as the amount spent, both depend on facts and surrounding circumstances. This varies from case to case. But the proviso to this section lays down that the expenditure is not necessary unless mortgagor has already been informed to protect the property or its title. Therefore, it may be said that if a mortgagee spends money in preserving the property from destruction or in defending mortgagor's title without calling upon him, the expenditure would be 'unnecessary' under this section. Except this situation, in other cases, 'necessity' is a matter of fact to be decided in each case.

47. *Ram Tulad v. Bissessar*, 2 LA 131 (P.C.)

Circumstances in which expenditure is allowed.—The mortgagee is entitled to spend money only under the following circumstances:—

- (1) Preservation of mortgaged property from destruction, forfeiture or sale.
- (2) Defending mortgagor's title to the property.
- (3) Defending his own (mortgagee's) title against the mortgagor.
- (4) Renewal of lease where property is a renewable lease.
- (5) Insuring the property where it is of insurable nature.

Preservation of mortgaged-property.—Clause (b) of this section allows a mortgagee to spend money for preservation of the mortgaged property. Property must be preserved because it is 'security' for repayment of the loan. It is the duty of mortgagor to preserve and protect his property. But, if he fails, the mortgagee has right to protect it so that his 'security' is not destroyed or devalued. If a mortgagee finds that the mortgaged property is being destroyed and his 'security' is likely to be affected, he should first ask the mortgagor to take steps. In case mortgagor fails to do so, the mortgagee is entitled to take necessary steps for protecting the property. The expenditure incurred by him in preserving the property e.g. by restoring the property damaged in fire etc. shall be included in the mortgage-money.

The mortgagee is entitled to preserve the property from being destroyed not only in its physical sense. He has right to spend money also in those cases where property is threatened to be destroyed or lost in its abstract sense. The mortgaged property may be destroyed in its abstract sense when mortgagee's 'security' is threatened due to some legal process e.g. foreclosure or sale. The mortgagee is, therefore, entitled to spend money so as to avoid foreclosure or sale due to mortgagor's default in non-payment of prior liabilities (e.g. prior mortgage or charge, if any) or government dues.

Defending mortgagor's title.—It is the mortgagor's duty to defend his title in the property whether it is in his possession or not. But if mortgagor is negligent and does not defend his own title in property the mortgagee has right to defend mortgagor's title against any one challenging the same. The mortgagor's title may be challenged or impeached by his co-shares or tenants or any other person. Challenging title means denying mortgagor's right over mortgaged property. In normal course, being owner of property it is the mortgagor himself who has to defend and prove, his title in a suit, proceeding or in any legal process. In case of mortgagor's default, the mortgagee is given the right to do so because his 'security' shall otherwise become unsafe. But, before a mortgagee takes any legal action in defending mortgagor's title then, first of all he must call upon the mortgagor to take such steps. If he fails, only then mortgagee is entitled to defend the title of mortgagor. The cost incurred by mortgagee in defending or supporting mortgagor's title would be included in the mortgage-money. However, where a mortgagee with knowledge that a third

person had an interest in the mortgaged property accepted the mortgage, he cannot claim from the mortgagor, the costs incurred by him in litigation.⁴⁸

As already stated the above-mentioned two rights namely, (i) right to spend money in preserving the property and (ii) right to spend money in defending mortgagor's title, both are subject to a condition. The condition is that the mortgagor to do the needful. If mortgagor had first asked the mortgagor to take steps in preserving the property or defending his title and spends money for these purposes upon failure of mortgagor, only then he (mortgagee) is entitled to add the expenditure in mortgage-money. For example, where the mortgagor's title is challenged or impeached by tenants and mortgagor after being informed by mortgagee, fails to take legal steps, the mortgagee can defend the title. The cost incurred by him (mortgagee) in defending such title would constitute a charge upon the mortgaged property.⁴⁹

Defence of mortgagee's title against mortgagor.—Where a mortgagee is challenged or opposed by mortgagor as being mortgagee, the mortgagee has an obvious right to defend himself. There might be situations when the mortgagor takes loan from the mortgagee but subsequently denies as having taken any loan at all on the ground of some legal defect in the mortgage transaction. In such cases, the mortgagee's right to recover his money is threatened. Therefore, under clause (d), mortgagee is entitled to defend his title or interest in the mortgaged property. He is also entitled to spend money in defending his status as mortgagee. Where a mortgagee files a suit against mortgagor (who denies mortgagee's status) to assert his interest in the mortgaged property, the amount spent in litigation may be added to the mortgage-money. It may be noted that in such cases, since the mortgagor himself denies the status of mortgagee and attempts to set aside the mortgage, the mortgagee need not inform the mortgagor before he files suit for defending his title.

Renewal of leases.—Where the mortgaged property is a renewable lease, the cost incurred by mortgagee in renewal of that lease may be incurred by mortgagee. And, such cost is added to the mortgage-money even though there is no covenant for it. As discussed under Section 64 of the Act, a mortgagor has right to get the benefit of the lease-hold mortgage property if the lease is renewed by mortgagee. It is, therefore, a legitimate right of the mortgagee that he must be reimbursed with the cost incurred by him for renewal of that lease.

Where a tenant (lessee) mortgages his leasehold property and subsequently the landlord obtains a decree for eviction, a new lease created by landlord in favour of mortgagee cannot be claimed by mortgagor. This creates altogether a new relationship between landlord and mortgagee. The mortgagee, therefore, is not entitled to get the cost, if any, for such a new transaction. In

*Nemichand v. Onkar Lal*⁵⁰ a lessee gave some amount as loan to the landlord on security of the property in his possession. This property was therefore mortgaged to the lessee by the landlord. On expiry of the period of mortgage, a suit for redemption was filed by the landlord. The Supreme Court held that the lease subsisted though the parties entered into a new relationship of creditor and debtor on security of the property already in possession of lessee as a lessee. The lessee (mortgagee) may not be allowed to add the cost of entering into new transaction, in the mortgage-money.

Premium for insurance.—If, by nature, the mortgaged property, is an insurable property and the mortgagor has not insured the property, the mortgagee is entitled to get it insured against loss or damage by fire. The expenses incurred in payment of the premium for such insurance may be added in the mortgage-money. The insurance premium stands on the same footing as other costs, charges and expenses. However, the mortgagee's right to insure the property is subject to any contract to the contrary.

Where the mortgagee has authority to insure the property i.e. there is no contrary contract, the mortgagee has right to add the amount of premium with interest.

Where no rate of interest for mortgage debt is fixed, the interest on the amount spent would be at the rate of nine percent per annum. However, the amount of such insurance should not exceed the amount specified in the deed for this purpose. If no such amount has been given in the deed, the amount of insurance should not exceed two-third of the amount which would be required to reinstate the property in case of total destruction.

73. Right to proceeds of revenue sale or compensation on acquisition.—(1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged-property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (1 of 1894), or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part, out of the amount due to the mortgagor as compensation.

⁴⁸ *Ram Ditta Mal v. Karmi Devi*, (1912) 1 C. 243.

⁴⁹ *Pakree Salieb v. Pober Banny*, (1898) 21 Mad. 32.

⁵⁰ AIR 1991 S.C. 2047.

(3) Such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

SYNOPSIS

- Mortgagee's Right to get proceeds of Revenue Sale etc.
- Right to proceeds of Revenue Sale.
- Rights to compensation on acquisition.

MORTGAGEE'S RIGHT TO GET PROCEEDS OF REVENUE SALE ETC.

Rights to proceeds of Revenue Sale.—Section 73 (1) provides that if the mortgaged property is sold due to non-payment of government dues, the mortgagee is entitled to claim the amount of his mortgage-money from the proceeds of such sale. The mortgaged property belongs to mortgagor who is liable to pay all the outgoings such as revenue, rent and taxes or other charges of the public nature. Where mortgagor defaults in payment of the government dues, the property is sold by the authorities who recover the required dues from proceeds of the sale. After payment of government dues, there may still remain the surplus of the price on which property was sold. The mortgagee has right to claim his mortgage-debt from out of this surplus amount. After payment of mortgagee's debts, if there still remains some money, it ultimately goes to the mortgagor whose property was sold.

The object of this provision is to protect mortgagee's interest as far as possible. This section is intended to refer to cases where the effect of any sale for arrears of revenue or rent is to nullify the mortgage.⁵¹ By virtue of the right given under this section, the mortgagee may recover his debt even though the 'security' is sold. In other words, even where mortgage is nullified under a legal process, the mortgagee's debt is not nullified. In place of the mortgaged property (which has now been sold) the mortgagee's security is substituted in the form of 'sale-proceeds'. It is therefore said that this section contains the doctrine of substituted security. Under this doctrine the mortgagee is entitled to recover his money not only from the mortgaged property but also from anything substituted in its place. Accordingly, if upon sale the property is converted into sale-proceeds (money), the mortgagee's claim exists against this substituted security i.e. the sale-proceeds.⁵²

Rights to Compensation on Acquisition.—Section 73 (2) provides that where the mortgaged-property is acquired under the Land Acquisition Act, 1894 or any other enactment and compensation is paid, the mortgagee can claim his debt from such compensation. This section was re-drafted and substituted by the Amending Act of 1929. The old section provided only for sale of mortgaged property in default of payment of revenue or other government dues. There was no provision for a case where mortgaged property was compulsorily acquired

under an enactment. The present section deals also with cases where property is acquired under an enactment. Accordingly, it is now provided that if the mortgaged property is compulsorily acquired under any law enforced for the time being, the mortgagee shall be entitled to claim payment of mortgage-money out of the compensation due to mortgagor.

Section 73 (3) enacts that a mortgagee's claim of mortgage money (from out of proceeds of revenue sale or from compensation on acquisition) shall get priority over other claims on the property except prior encumbrances, if any. Thus, mortgagee's claim under this section shall prevail over any unsecured money debt taken by mortgagor. Further, the mortgagee under this section is entitled to enforce his claim even though the mortgage-money has not become due. This is obvious, because neither sale in default of payment of revenue nor acquisition under an enactment takes into consideration the date on which the debt becomes payable.

74 and 75. [Omitted by Section 39 of the T.P. (Amendment) Act, XX of 1929.]

76. Liabilities of mortgagee in possession.—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own;
- (b) he must use his best endeavours to collect the rents and profits thereof;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rents accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- (e) he must not commit any act which is destructive or permanently injurious to the property;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as

51. *Bani Prasad v. Ram Lal*, (1897) 24 Cal. 746.

52. See *Amer Muhammad v. S.A.S. Allagappa Chettiar* (1977) 1 M.L.J. 76

may be necessary, in re-instating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

(h) his receipts from the mortgaged property, or, where property is personally occupied by him, a fair occupation-rent in respect thereof, shall after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest, and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss occasioned by his default.—If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure.

SYNOPSIS

- Duty to manage the property.
- Duty to collect rents and profits.
- Duty to Pay Rents, Revenue and Public Charges.
- Duty to make necessary repairs.

- Duty not to commit any destructive Act
- Duty towards insurance money.
- Duty to keep accounts.
- Duty to apply rents and profits.
- Duty to account for gross receipts after tender or deposit.
- Failure to perform duties under this section.

LIABILITIES OF MORTGAGEE IN POSSESSION

Section 76 deals with liabilities of mortgagee in possession of the mortgaged property. Since the mortgagee advances money to mortgagor on security of the mortgaged property, he has rights against mortgagor and the property. There is no question of his duties. But, where the mortgagee is in possession of the property, he has certain duties because the property belongs to mortgagor. The mortgagee, in such cases simply retains the property by way of 'security' together with its benefits in lieu of interest of the debt. He has, therefore, certain duties towards this property. Normally, the mortgagee retains possession in usufructuary mortgage. But this section is not limited to usufructuary mortgage. It is applicable to any mortgagee who for, some reasons, may have possession under a foreclosure decree or any other case where possession exists with mortgagee. However, in no case this is applicable where "possession is unrelated to mortgage."⁵³ The opening sentence of this section says ; "when during continuance of the mortgage, the mortgagee takes possession of this section arise only when mortgagee is in possession of the property. The duties (liabilities) of mortgagee under this section are as under :—

- (a) Duty to manage the property as a person of ordinary prudence.
- (b) Duty to collect rents and profits of the property to the best of his efforts.
- (c) Duty to pay government-dues unless there is contract to the contrary.
- (d) Duty to make necessary repairs of the mortgaged property unless there is contract to the contrary.
- (e) Duty not to commit any act which may destroy the property permanently.
- (f) Duty to apply the insurance-money in restoring the property or in reduction of the mortgage-money if he receives such money respecting mortgaged-property.
- (g) Duty to keep proper accounts of all his receipts and debts and to provide it to mortgagor at his request and cost the true copies of such accounts and of vouchers.

^{53.} *Venugopala Rao v. Hanumanth Rao*, AIR 1958 Andh. p. 341.

- (d) Duty to debit to his account rents and profits against interest which may from time to time becomes due to him, and, against reduction of mortgage-money the surplus, if any, after deducting the expenses properly incurred in management etc. of the property.

- (i) Duty to account for all his receipts if he continues possession after mortgagor deposits the mortgage-money into Court or, lenders for the same.

The duties of the mortgagee under this section are statutory duties. Therefore, except under clauses (c) and (d) where the duties are subject to any contract to the contrary, the mortgagee is liable for any breach on his part. Where a mortgagee fails to perform his duties, he may be asked to incur the loss caused by such failure. The loss incurred would be deducted from his mortgage-money. A brief account of these liabilities is given below under separate heads.

(a) *Duty to manage the property.*—While in possession of mortgaged property, the mortgagee is liable to manage the property in the same manner as is expected from a reasonable prudent man. He would take care of the property in the ordinary course as a normal man does in respect of his own property. Although, a mortgagee in possession is not a trustee for the mortgagor yet his duties towards the mortgage property are similar to the duties of a trustee as laid down in Section 15 of the Indian Trusts Act.

As regards the manner of taking care or of managing the property, he is not bound by the directions of the mortgagor. He has his own rights of managing the property. He is not dependent on mortgagor's consent or of his directions regarding the rents and profits of the land in his possession. He may lease out the mortgaged property to any person so as to get maximum amount of benefits out of the property. He can effect the lease in favour of mortgagor himself provided he is ready to pay the rents reasonably. However, a mortgagee can lease out the property only for a period which does not exceed beyond the term of mortgage. It is not permissible for him to grant lease which may extend beyond the termination of his own interest in the mortgaged property.⁵⁴ It is not permissible for him to grant a permanent lease.

Where the mortgaged property is an agricultural land, the mortgagor is bound to cultivate only such crops which the land is capable of yielding. He may cultivate it as he likes. He cannot be expected to do more than what mortgagor would have done in the ordinary course. But, he is not bound to cultivate any particular crop giving unusual yields so as to help the mortgagor to pay off his debt earlier. As a general rule, the mortgagee in possession is accountable only for what he receives in the normal course. He is not bound to take any particular trouble to make the most of another man's property.

(b) *Duty to collect rents and profits.*—The mortgagee in possession has duty to make efforts for collecting rents and profits of the mortgaged property. Collection of rents and profits is one of the important aspects of usufructuary

54. *Mahabhar v. Harbans*, AIR 1952 S.C. 205; *Sachindral Purasram v. Ratanhai*, AIR 1972 S.C. 637.

mortgage because mortgagee has to adjust the profits against interest and the mortgage-money. Accordingly, he is required to give an account of the rents and profits which he receives from time to time. It is immaterial whether the property was leased out before or, after execution of the mortgage. Even if the lease on the property was granted before execution of mortgage, the mortgagee has a duty to maintain a proper account of the rents from the date on which he takes possession. A mortgagee must be diligent in collecting rents and profits of the property in his possession. Failure to do so may amount default on his part. However, the mortgagee is liable only for wilful neglect in collecting rents from property in his actual possession. He is not liable for the total recorded rental of the property. He is liable only for such sums as were actually received by him.

(c) *Duty to Pay Rents, Revenue and Public Charges.*—A mortgagee in possession must pay the rents, revenues and other public charges on the property. Where mortgaged property is leasehold, the mortgagee has duty to pay its rents. He is liable to pay other public charges such as revenue, taxes or other outgoings. This section is counterpart of Section 65 (c) which imposes the duty of payment of public charges on mortgagor when property is in his possession.

In the absence of any contract to the contrary, the mortgagee is bound to pay the revenue and other public charges in respect of the mortgaged property. He cannot take the benefit of property without paying the taxes etc. But, he is liable to make these payments from out of the income of property in his possession. If the income of property is insufficient, the mortgagee is expected to pay the public charges from his pocket. But in that case, he is entitled to add this amount in the debt. Where the revenue was not assessed at the time of execution of mortgage but was assessed subsequently, there too the mortgagee is liable to pay the outgoings. Where a mortgagee fails to pay the required public charges though the property gives sufficient income and because of this default the property is sold which mortgagee purchases himself, the mortgagor would not lose his right of redemption. In *Panchanan Sharma v. Jagannani*,⁵⁵ possession of property was delivered to the mortgagee under usufructuary mortgage for its enjoyment till redemption and to pay land revenue. The property was sold due to his (mortgagee's) default in not paying the land revenue. The Supreme Court held that when the property was sold, it could not be said that the mortgagor had lost his right of redemption by the conduct and actions (default in payment of land revenue) of the mortgagee.

The duty is not limited to rents and revenues; it includes 'other public charges' on the mortgaged property. For example, the mortgagee is bound to pay

55. AIR 1956 S.C. 1743. See also *Puran Chand v. Kripal Singh*, AIR 2001 S.C. 423 where the mortgagee claimed that he was in possession of property as tenant under a Tenancy Act, and not as mortgagee. But there was no proof that mortgagee had ever managed the property as his own, including payment of taxes etc., nor it could be proved that he inherited tenancy rights. The Supreme Court held that his (mortgagee's) tenancy rights do not survive and he has, therefore, no right to continue in possession of the mortgaged property after redemption of the mortgage.

'*laavi*' claims for non-payment of which the property may be sold away.⁵⁶ Similarly, it includes municipal taxes. Therefore, if there is an agreement between the parties that the rent is to be set off against the principal and interest, the mortgagee is liable to pay these taxes but he is entitled to set off or adjust the amount so paid in the mortgage money.

This clause is subject to any contract to the contrary. Therefore, if there is an express agreement providing that the public charges shall be paid by the mortgagor, the mortgagee cannot be bound to pay the dues under this clause. The liability of mortgagee was limited to payment of Government dues attributable to the mortgaged land. Agricultural income-tax was found to be mortgagee *qua* the owner of land. It was not attributable to property. The mortgagee was not under obligation to pay such dues. The mortgaged property was sold for recovery of income-tax dues. The right of redemption was held to have become extinguished.^{56a}

(d) *Duty to make necessary repairs.*—In the absence of any contract to the contrary, the mortgagee in possession is bound to make necessary repairs in the property. The duty to make repairs arises only when the mortgagee is actually in possession of property. If the property is in possession of a lessee, the mortgagee has no duty to make repairs. The necessary repairs in the property are to be made out of the surplus of the rents and profits of property. That is to say, the mortgagee is required to spend the difference between the (a) public charges and interest on the principal money and (b) the rents and profits. This difference is the 'surplus' of the rents and profits. The mortgagee's liability to spend money on necessary repairs is limited to this surplus. In other words, the mortgagee is not bound to spend money on repairs unless some money is left after deducting interest and public charges from the rents and profits of property.

Necessity of repairs in the property is a matter of fact and it may vary from case to case. The money spent on repairs of well is a necessary expenditure under this clause. But, the cost of laying down water pipes in a house has been held not necessary.⁵⁷

(e) *Duty not to commit any destructive act.*—The mortgagee has a duty not to commit any act which is destructive or permanently injurious to the mortgaged property. The mortgagee must not commit any waste on the property so as to reduce the value of his own security and also the property of mortgagor. This duty is incidental to the general duty of mortgagee to manage the property as a trustee. However, the mortgagee is liable only where the destruction or injury is caused by his own act. If the property is destroyed by natural forces e.g., earthquakes, flood etc. he is not liable. Rather, in such cases he himself would have a right to get additional security from mortgagor.

The mortgagee cannot cut down the trees which already existed on the mortgaged property. But, he may cut down the trees planted by him on the property after execution of mortgage. If the mortgaged property is not agricultural land, it cannot be said that the property was damaged by the tree-

56. *Jhalli Ram v. Dattel Singh*, AIR 1957 Nag. 254.

56a. *Rukmini Annu v. Rajeswari*, AIR 2013 SC 2428.

57. *Kutusso Narayanaswami v. Srinivasam*, (1914) 22 I.C. 635; Cited in *Mulla, TRANSFER OF PROPERTY ACT*, Ed. VII (reprint 1990) 1 p. 520.

roots or stumps remaining on the land after removal of trees planted by the mortgagee.

(f) *Duty towards proper use of insurance money.*—Where the mortgaged property has been insured against loss by fire, it is the duty of mortgagee to apply the insurance money in restoring the property. Under Section 72, if the property is by its nature insurable, it is the duty of mortgagor to get it insured against loss by fire. Under this section, the mortgagee is bound to apply the money received under insurance policy in reinstating the property. However, if the mortgagor may also adjust the amount in reduction of the debt. It is to be noted that property may be insured only for two-third of its value. Therefore, what is expected from mortgagee is simply repair of certain parts of mortgaged property which have been actually destroyed. The word 'reinstating' as used in this section does not mean that mortgagee must restore or re-construct the property if the whole of it has been completely destroyed.

Duty imposed on the mortgagee under clause (f) of this section does not apply to a case where Receiver has been appointed by the Court. In such cases, it is for the Court to determine as to what amount of insurance money is to be applied for restoring the property and what for other claims. The mortgagor cannot claim that a particular sum of money received by Receiver as insurance money must be applied in restoring the damaged property.⁵⁸

(g) *Duty to keep accounts.*—The mortgagee must keep accurate accounts of all the sums received and spent by him in respect of the property in his possession. The duty to maintain an accurate account is statutory duty of every mortgagee having possession of the mortgaged property. Therefore, he is bound to keep full account of all the income and expenses on the mortgaged property. During mortgage, the mortgagee holds mortgagor's property in a fiduciary capacity. Although he is not a trustee on behalf of mortgagor but, his duties respecting property in his possession are similar to those of trustee as given in Section 19 of the Indian Trusts Act. It may be noted that being a statutory duty, the mortgagee in possession cannot contract himself out of this duty by entering into any contrary contract. The duty to keep the accounts has only one exception given in Section 77. As discussed in the following lines, under Section 77 if the terms of mortgage say that mortgagee is entitled to adjust the income against interest or, some against interest and the rest against mortgage-money, the mortgagee need not give full account. This is so because after adjusting the whole amount of rents and profits against interest or debt, there remains nothing for other purposes (e.g., repairs etc.) the account of which may be deemed necessary. Therefore in these cases the mortgagee has no such duty. But, where the mortgage-deed is silent about the arrangement of rents and profits, the mortgagee has to utilise the usufruct for several purposes e.g., repairs etc. In such cases, it is obligatory on the mortgagee to keep full accounts. However, the liability to render the accounts does not arise before filing of suit for redemption. When the mortgagor files a suit for redemption of the mortgage, the mortgagee is liable to render full account of the income and expenditure. A mortgagor has no right to bring a suit only for accounts, he is not entitled to

58. *Seth Dooly Chaud v. Ramswami*, (1917) 40 I.C. 623. See *Mitra's, TRANSFER OF PROPERTY ACT*, Ed. XIII, p. 693-694.

separate his right of redemption from his right to take accounts. The mortgagee has a duty to render the accounts not only upto preliminary decree but upto date of final decree.⁵⁹

Suit for accounts maintainable after redemption by operation of law.—It was a case of usufructuary mortgage. The mortgagee continued to be in possession even after discharge of the mortgage by operation of law, namely by virtue of the operation of a Debt Relief Statute. The mortgagor sought rendition of accounts of the income and profits from the property from the date of discharge of the mortgage. The suit was held to be maintainable.⁶⁰

(h) **Duty to apply rents and profits.**—Section 76 (h) provides for the manner in which the mortgagee in possession has to apply rents and profits during the mortgage. It is the duty of the mortgagee to apply the income of mortgaged property only in the manner provided in clause (h) of this section and in no other way. The system of accounting, as laid down in this clause, is in the following order—

(i) First of all, the mortgagee shall debit against himself, the total income (rents and profits) from the mortgaged property. Where property is let out on rent, he must account for the rents received. If the house is occupied by mortgagee himself, he must debit against himself a fair amount as rent. Similarly, he has to maintain an account of the income from the produce if the mortgaged property is an agricultural land.

(ii) Next, the mortgagee is required to make an account of all the expenses incurred by him in managing the property in his possession. He shall credit all the expenses to his account.

(iii) Thereafter, the mortgagee has to make an account of all the public charges paid by him. He shall credit to himself all the public charges paid by him.

(iv) Next, he shall credit to himself the money spent on necessary repairs if any on the mortgaged property.

(v) Thereafter, the mortgagee is required to credit to himself the interest that may accrue due to him from time to time. Normally, the interest due to him on mortgage-money is calculated annually.

(vi) In the end, all the sums so far credit are added to get the gross (total) amount due to him. The total amount due to him is deducted from the gross (total) income from rents and profits. The balance so obtained is the surplus. This surplus amount must be adjusted in reduction of the mortgage-money.

(vii) If there still remains some surplus, then such amount must go to mortgagor.

(i) **Duty to account for gross receipts after tender or deposit.**—Clause (i) of Section 76 imposes this duty on mortgagee after the mortgagor tenders him the mortgage-money or deposits it in the Court. When the mortgagor tenders the mortgage-money to mortgagee or deposits it in the Court, the transaction of mortgage terminates in essence. But the mortgagee may still continue the possession till he actually receives the money. This clause provides that under this situation mortgagee has a duty to account for all the rents and profits received by him from the date of tender or deposit of money in Court till he actually gets the money. The rents and profits as received by him during this period cannot be included in the mortgage-money.

Effect of Failure to Perform Duties under this Section.—The concluding paragraph provides that mortgagee is liable for any loss caused to the mortgaged property due to non-performance of any duty by him under this section. In such cases the mortgagor is entitled to ask the Court to debit the mortgagee with the value of such loss when accounts are being taken while passing of the decree on mortgage. For example, where the mortgagee did not pay the public charges on property and mortgagor had to pay the same in order to avoid the sale, the mortgagee is entitled to credit for this amount. The mortgagor is entitled to set off any loss suffered by him owing to mortgagee's default in the same suit. Separate suit for such account is not necessary.⁶¹

The remedy available to mortgagor under this section does not debar him from seeking any other remedy to which the mortgagor is entitled under any law. Thus, in case of loss to property due to mortgagee's default, the mortgagor is entitled to bring a suit for damages at once. He need not wait to debit the mortgagee with loss when account are being made at the time of redemption.⁶²

77. Receipts in lieu of interest.—Nothing in Section 76, clauses (b), (d), (g) and (h), applies to case where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of interest.—This section is an exception to Section 76. Section 76 Clauses (b), (d), (g) and (h) provide certain duties of mortgagee in possession. In discharge of these duties he has to spend some money. It is also a duty of mortgagee in possession that he has to maintain an account of the income as well as expenditure on the mortgaged property. Section 77 provides that if it is agreed between the parties that rents and profits received by mortgagee are

⁵⁹ *Singaramayya v. Sengaramayya*, AIR 1949 Mad. 413; *Agarwal Bal v. Chandra Lal*, AIR 1945 S.C. 395.

⁶⁰ *Prasanna Kumar v. M. Adityan Pillai*, AIR 1934 S.C. 540.

⁶¹ *Shiva v. Jany*, (1892) 15 Mad. 290. Cited in *Mulla, TRANSFER OF PROPERTY ACT*, Ed. VII (reprint 1960), p. 520.

⁶² *Mahabir v. Shree Shankar*, AIR 1929 Oudh 124.

to be taken by him in lieu of interest or interest and mortgage-money both, the mortgagee has no duty to give accounts of the income. This section is, therefore, by way of an exception to the general rule that a mortgagee in possession of the mortgaged property must render an account of the benefits derived during possession.

The exception is limited to specified cases only namely, stipulation for rents and profits in lieu of interest or in lieu of interest and specified part of it towards mortgage money. Thus, the exception is applicable to a case where mortgagee has to appropriate the income in lieu of interest. It is also applicable to a case where mortgagee has to take the income of property as interest and also a fixed sum of money annually from the mortgagee towards mortgage-money. But, the exception is not applicable where the mortgagee simply makes an estimate of the rents and profits which would be available for reduction of the mortgage-money. In such cases Section 77 is not applicable and mortgagee is liable to account.

RIGHTS AND DUTIES OF MORTGAGOR AND MORTGAGEE SUMMARISED

Mortgage is a transaction in which primarily two parties namely, mortgagor and mortgagee are involved. Accordingly, they have certain rights and liabilities against each other. Respective rights and duties of mortgagor and mortgagee may be stated under separate heads.

Rights of mortgagor.—The rights of mortgagor are given in Sections 60 to 65-A. Mortgagor's rights are as under :—

- (i) Right to redeem the mortgage.
- (ii) Right of inspection and production of documents relevant to the transaction of mortgage.
- (iii) Right to redeem the mortgage separately or simultaneously.
- (iv) Right to appropriate accession, if any, to the mortgaged property.
- (v) Right to appropriate improvements, if any, to the mortgaged property.
- (vi) Right to renewal of lease where the mortgaged property is leasehold.
- (vii) Right to effect lease of the mortgaged property.

Duties of mortgagor.—The liabilities of mortgagor are incorporated in Sections 65 and 66. Under Section 65 the liabilities arise out of covenants whereas, under section 66 there is only one liability which does not arise out of contract. Liabilities (duties) of mortgagor are as under :—

- (i) Liability to guarantee his title in the mortgaged property.
- (ii) Liability to defend his title in the mortgaged property in case it is in danger.
- (iii) Liability to make payments of public charges e.g., revenue, taxes etc. if the property is in his possession

(iv) Liability to pay rents if the mortgaged property is leasehold and mortgagee is a lessee.

(v) Liability to discharge prior encumbrances on the mortgaged property, if any.

(vi) Liability not to commit waste on the mortgaged property. This liability does not arise out of covenant.

Rights of mortgagee.—The rights of mortgagee are laid down in Sections 67 to 73 of this Act. Mortgagee's rights are given below :—

(i) Rights of foreclosure or sale of the mortgaged property is default of non-payment of debt.

(ii) Right to sue mortgagor for the recovery of mortgage-money.

(iii) Right to exercise power of sale if given under the mortgage-deed.

(iv) Right to get a Receiver appointed.

(v) Right to accession to mortgaged property.

(vi) Right to have the benefit of renewed lease if mortgaged property is leasehold.

(vii) Right to spend money in preserving the property, defending mortgagor's title or in renewal of lease if the property is in his possession.

(viii) Right to receive proceeds of revenue sale (or compensation on acquisition) of the mortgaged property.

Liabilities of mortgagee.—The liabilities of mortgagee are given in Section 76. His liabilities arise only where he is in possession of the mortgaged property. The duties of mortgagee in possession of property are as under :—

(i) Liability to manage the property with ordinary prudence.

(ii) Liability to collect rents and profits with due diligence.

(iii) Liability to pay the government dues in case there is no contract to the contrary.

(iv) Liability to spend money for necessary repairs in the mortgaged property.

(v) Liability not to commit waste on the mortgaged property.

(vi) Liability to apply the insurance money, if received, for re-instating the mortgaged property.

(vii) Liability to debit to himself the interest which, from time to time, becomes due to him and in case of any surplus, in reduction of the mortgage-money.

(viii) Liability to account for the gross receipts in case he retains possession after the mortgagor tenders or deposits the mortgage-money in Court.

The rights and duties of mortgagor and mortgagee are against each other i.e. between mortgagor and mortgagee. A property may be mortgaged to two or more persons one by one. In such cases, besides rights and duties of mortgagor and mortgagee, the *inter se* rights and duties of mortgagees themselves are involved. Rights of mortgagees *inter se* i.e. amongst themselves are given in the following lines.

Priority

78. Postponement of prior mortgagee.—Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

SYNOPSIS

- Rights of Subsequent Mortgagees.
- Exception to doctrine of priority.
- Fraud.
- Misrepresentation.
- Gross-Negligence.

RIGHTS OF SUBSEQUENT MORTGAGEES

A property may be mortgaged to two or more persons one after the other. In such cases, there is the first mortgagee to whom the mortgage is effected first. The same property may be mortgaged to second mortgagee and thereafter to the third and so on. Where the same property is mortgaged to two or more persons successively the subsequent mortgagees of the same property have rights against each other.

For example, A mortgages his house to B and takes Rs. 5000/- from him as loan. A then mortgages the same house to C and takes Rs. 3000/- from C. A, then mortgages the same house to D for another loan Rs. 2000/- from D. Here, B is the first mortgagee and C and D are subsequent mortgagees.

When the mortgaged property is sold in default of repayment of loan, the money is utilised for discharge of the debts. In case of several mortgagees of the same property, the question is as to which mortgagee is to be paid first. This situation is dealt with under the doctrine of priority as given in Section 48 of the Act. The doctrine of priority is given in the maxim : *qui prior est tempore potior est jure*. This means, 'prior in time is prior in rights'. Thus, the first mortgagee is paid first and the other subsequent mortgagees are paid successively in the same order of priority.

Exception to the doctrine of priority

But Section 78 does not deal with this rule of priority. Section 78 provides an exception to the doctrine of priority. Section 78 enacts that where by fraud,

misrepresentation or gross negligence of prior mortgagee, any person is induced to give money on security of the same property then, the prior mortgagee is postponed to the subsequent mortgagee. For instance, a property is mortgaged to A. The same property is then mortgaged to B who gives loan to mortgagor. Before giving money, B enquires from A whether the said property was free from encumbrances. A conceals his own mortgage and fraudulently replies yes, and B advances money. Here A is the first mortgagee and B is subsequent mortgagee of the same property. As a general rule, A himself has prior rights over B. But, since A himself has committed fraud, therefore, his status of prior mortgagee stands postponed in favour of B who is subsequent mortgagee. In essence, this is the effect of the rule laid down in Section 78. The three circumstances in which this exception is applicable are, fraud, misrepresentation and gross-negligence.

Fraud.—Fraud means an act with the intention of deceiving another person. Dishonest intention is necessary for fraud. It includes suggestion of a fact which is not true and active concealment of a fact which is true. Active concealment of fact is fraud only where there is duty to speak, not otherwise. Where the mortgagee fraudulently conceals the fact that he himself made a prior advance on the same property on which the subsequent mortgagee had given money, the prior mortgagee cannot claim priority.

Misrepresentation.—Misrepresentation means mis-statement of a fact without any dishonest intention. It is necessary that the person being misrepresented not only believes upon the statement but also acts in furtherance of that statement. If there is no dishonest intention but only an omission to notify a prior mortgage, the mistake, though innocent, amounts to misrepresentation. Similarly, where a prior mortgagee saw the deed of second-mortgage in which it was written that the property is free from encumbrances, but remains silent and sees another person lending money on the same property, there is misrepresentation by him and he cannot claim priority.⁶³

Gross-Negligence.—A negligence so grave (gross) in nature that it cannot be believed that a man of ordinary prudence would have committed such a great mistake in the normal course, is a gross-negligence. A simple negligence is innocent without any dishonest intention. But a gross-negligence may be regarded as an evidence of fraud. Any mistake by a prior mortgagee which enables the mortgagor to deal with property as if it was not encumbered is not any ordinary mistake; it is a great mistake. Therefore it may be a gross-negligence. A person who puts the property in the power of another to deceive and to raise money must take the consequences.⁶⁴ In *Lloyds Bank Ltd. v. P.E. Guddar & Co.*,⁶⁵ one G deposited the title-deeds of his property with Bank N and took some money as loan. This was, therefore, a mortgage by deposit of

63. *Raman Chetty v. Steel Brothers*, (1911) 11 IC 503 (PC).

64. *Lord Romilly in Bridge v. Jones*, (1870) L.R. 10 Eq. 92.

65. AIR 1930 Cal. 22.

title-deeds in which the only security for repayment is possession of title-deeds of property of debtor. G. after sometimes asked N to give him back the title-deeds so that he may show it to an intending purchaser. He further said that only after selling this property he can satisfy the debt of N. In such cases, the normal practice is that the intending purchaser goes to the creditor having possession of title-deeds, and confirms the title by inspecting it. The creditor does not hand over the deeds to anyone. But, the Bank N believing on the statement of G handed over the title-deeds to him. G then deposited these title-deeds to another Bank L to secure another loan from this Bank. The question arose as to whether Bank N or G would be given priority in case of sale of the mortgaged property? It was held by the Court that Bank N has committed gross-negligence in handing over the title-deeds. Here, N was prior mortgagee but he had committed an act of gross-negligence by handing over the deeds to G and thereby giving him opportunity to induce another person (Bank L) to advance money. Accordingly, the Court held that under Section 78 the subsequent mortgagee i.e. Bank L would get priority over Bank N.

An equitable mortgage can be created by deposit of certified copies of original title deeds. The owner created such a mortgage in favour of one bank. He subsequently mortgaged the same property to another bank by depositing the original title deeds. The subsequent mortgagee was held to have priority. It was a gross negligence on the part of the first bank to have accepted certified copies without verifying whether the original had really been lost.^{55a}

79. Mortgage to secure uncertain amount when maximum is expressed.—If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debts not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration

A mortgages Sultanpur to his bankers B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000/- C having notice of the mortgage to B & Co., and C gives notice to B & Co., of the second mortgage. At the date of the second mortgage, the balance due to B & Co., does not exceed Rs. 5,000. B & Co., subsequently advance to A sum making the balance of the account against him exceed the sum of Rs. 10,000, B & Co., are entitled, to the extent of Rs. 10,000/- to priority over C.

SYNOPSIS

- Mortgage to Secure Future Advances.

- Notice of Prior Mortgage.
- Maximum Amount Secured.

Mortgage to Secure Future Advances.—Section 79 provides another exception to the rule of priority in cases where the same property is mortgaged to two or more persons. Under this section, a subsequent mortgagee, having notice of the prior mortgage, is postponed as regards further advances made subsequently by the prior mortgagee. The rule under this section may be explained, thus;

- (i) A mortgages property X to B.
- (ii) A mortgages property X to C.
- (iii) A mortgages X once again to B for a fresh debt.

Here, as in between mortgage (i) and (ii), B is prior mortgagee and C is subsequent mortgagee. Although B advances, on the same property X some fresh loan to the same mortgagor A but this mortgage (iii) is subsequent to mortgage (ii) in favour of C. Under the rule of priority, mortgagee C should get priority over B for fresh loan under the mortgage (iii). But the exceptional rule given in this section is that if mortgage in favour of B under (i) was made to secure also future advances upto a fixed maximum, then any further advance (such as third mortgage to B for fresh advance in this example) made by B shall be treated as part of mortgage (i) which is already a prior mortgage. Thus, the effect of the exceptional provision of Section 79 is that although B under mortgage (iii) is a subsequent mortgagee as against C but (B) would get priority over him (C).

In order to attract the provisions of this section following conditions are necessary:—

- (a) The subsequent mortgagee must have notice of the prior mortgage, and
- (b) The prior mortgage expresses the maximum amount which can be secured in future on the same property.

Notice of Prior Mortgage.—The exceptional rule of Section 79 is applicable only where the subsequent mortgagee has notice of a prior mortgage of the same property. If subsequent mortgagee has notice of prior mortgage he must also have notice of future advances in it. Thus, in the above-mentioned illustration, in order that the claim of priority of C be postponed in favour of B under mortgage (iii), it must be proved that C had notice of prior mortgage of which mortgage (iii) is a part. If he had no notice of any prior mortgage of this section shall not apply and the general rule of priority shall determine the claims of B and C.

But under this section it is not necessary that prior mortgagee making fresh advance must also have notice of the fact of intermediate mortgage. In the illustration given above, for claiming prior right it is not necessary that B made in favour of C. Accordingly, under this section prior mortgagee does not lose his claim of priority in respect of fresh advances due to the fact that he had no notice of an intermediate mortgage of the same property.

Maximum Amount Secured is Expressed.—Another condition for the applicability of this section is that the maximum amount which can be secured under the first mortgage must be mentioned in the first mortgage. The advances made afterwards by the first mortgagee must be within the maximum amount expressed. If future advance exceeds that limit, this section does not apply for such excess advance. That is to say, the mortgagee under this section cannot claim priority over intermediate mortgage for the amount advanced by him exceeding the maximum limit. For example—

- (i) A mortgages his property to B to secure a loan of Rs. 10,000/-. In this mortgage B advances only Rs. 5,000/- to A promises to give the remaining amount afterwards.
- (ii) A mortgages the same property to C to secure another loan of Rs. 10,000. C has notice of first mortgage and also of the maximum amount secured under the first mortgage.

(iii) B advances the remaining Rs. 5,000/- to A on the first security.

Here, since the advance of the balance amount, i.e., remaining Rs. 5000/- under mortgage (iii) on the first security makes up the total amount secured, under first mortgage (i.e., makes up Rs. 10,000/-) the additional advance by B, though subsequent to C, would be treated as part of the first mortgage. Therefore, B making advance of the remaining amount would get priority over C. But if B advances Rs. 7,000/- instead of the balance of Rs. 5,000/- he cannot claim priority under this section because the future advance now exceeds the maximum limit of Rs. 10,000/- as secured in the first mortgage.

It is not necessary that the mortgage-deed should lay down the maximum amount exactly in the arithmetical figure. It is sufficient if the maximum amount could be ascertained by calculations prescribed in the deed. Where no maximum is fixed nor any mode of ascertaining the same has been laid down in the deed, this section does not apply.

Where a mortgage is executed by way of continuing security for the payment of all debts due and also that which may be due later on, he is entitled to priority not only in respect of the amount advanced but also on the interest accruing on the amount advanced.⁶⁶

It is significant to note that this section is not an exception only to the general rule of priority given in Section 48 but, it is an exception also to Section 93. Section 93 provides that a prior mortgagee cannot take any subsequent advances on the basis of original mortgage. But, Section 79 provides an exception to this rule subject to the above-mentioned two conditions.

80. [Omitted by Section 41 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929) and reproduced in Section 93.]

Marshalling and Contribution

81. **Marshalling securities.**—If the owner of two or more properties mortgages them to one person and then mortgages one

or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

SYNOPSIS

- Meaning of Marshalling.
- Condition for Marshalling.
 - Common Mortgage.
 - No Prejudice to Prior Mortgagee.
 - No Prejudice to third Parties.
- Notice.
- Contract to the contrary.

MARSHALLING

Meaning of Marshalling.—Marshalling means arranging things. Right of marshalling securities is a right of pious (subsequent) mortgagee. Section 81 incorporates the right of a subsequent mortgagee to make such an arrangement (marshalling) that as far as possible the prior mortgage-debt is satisfied out of properties not mortgaged to him. The right given to a subsequent mortgagee under this section contemplates a situation where a mortgagor mortgages two or more properties first to a mortgagee and thereafter, mortgages some of these properties (already included in first mortgage) to a different person, i.e., subsequent mortgagee. Under Section 81 the subsequent mortgagee is entitled to say that the prior mortgage debt must be satisfied out of property or properties which was not mortgaged to him; if it was not possible only then property mortgaged to him may be affected. The right given to a subsequent mortgagee under this section may well be explained by following illustration :

- (1) A mortgages properties X, Y and Z to B for securing a loan of Rs. 10,000.
- (2) A then mortgages property Z to C for securing another loan of Rs. 5,000 taken from C.

Here, B is a first mortgagee on properties X, Y and Z which are securities for a debt of Rs. 10,000/-. Out of these three properties which already constitute security for an earlier debt, property Z is mortgaged to C as a security for another debt of Rs. 5,000/-. B is prior mortgagee and C is subsequent mortgagee. The right given to C (subsequent mortgagee) entitles him to say that the debt of Rs. 10,000/- should be satisfied out of sale-proceeds of properties X and Y only and not from Z which has been mortgaged to him. However, in case X and Y could be sold for less than Rs. 10,000/- property Z may be sold to complete the amount. In this manner, although C is a subsequent mortgagee and his claim is not prior to that of B but, he (C) has right of marshalling or arranging the

securities (properties) in his favour as far as possible. Accordingly, the right given to the subsequent mortgagee under this section is called right of marshalling securities.

It may be noted that the right of marshalling securities is not any absolute right; it is subject to following conditions :

- (1) The mortgages may be two or more persons but the mortgagor (debtor) must be the same, i.e., the mortgagor must be common.
- (2) The right cannot be exercised to the prejudice of prior mortgagee.
- (3) The right cannot be exercised also to the prejudice of any other person having claim over the property.

Common Mortgagor.—For application of the right of marshalling, it is necessary that mortgagor is the same person who mortgages his different properties to different persons (mortgagees). Marshalling implies two or more sets of properties one of which is common to two or more mortgagees. But, the mortgagor must be common. No marshalling can be exercised unless the mortgagees between whom it is enforced are creditors of the same person and have claims against the property of common debtor.⁶⁷

No Prejudice to Prior Mortgagee.—The right of marshalling cannot be exercised to the prejudice of the prior mortgagee. This section does not lay down any exception to the general rule that the claim of prior mortgagee prevails over the claim of subsequent mortgagee. It simply entitles a subsequent mortgagee to protect his own interest, as far as possible, without affecting the interest of prior mortgagee. Therefore, where two properties X and Y are mortgaged to B and thereafter property Y is mortgaged to C, the subsequent mortgagee C cannot say that property Y should not be affected even if B's debt could not be satisfied out of the sale of X. When the prior mortgagee is unable to recover his money out of the sale of X only, he cannot be prevented by C from selling Y and completing the balance of his debt. As a rule, the right of marshalling cannot be exercised against a prior mortgagee where there is any doubt as to sufficiency of the mortgage-debt upon which the subsequent mortgagee has no claim. However, where a puisne mortgagee has taken the mortgage expressly on condition of discharging certain amount due on the prior mortgage but fails to fulfil that term, he cannot exercise the right of marshalling.⁶⁸

No Prejudice to third Parties.—The right of marshalling cannot be exercised also against any third party or a transferee for value. The right under this section provides simply a convenience to a subsequent mortgagee but he is not allowed to avail this benefit at the cost of any other person interested in the transaction. It is to be noted that right of marshalling is exercisable by a

67. *Ex parte Kendall* (1811) 17 Ves, 520 1 WTL.C. 46; *Ramaswamy v. Madun Mills*, (1916) 1 Mad. W.N. 265 ; 34 IC 338. Cited in *Mitra's TRANSFER OF PROPERTY ACT Ed. XIII* p. 719.

68. *Dontha Pullaya v. Jiddu Manikya Rao*, AIR 1926 Andh p 425.

subsequent mortgagee only when prior mortgagee seeks to realise the mortgaged debt. But, it is possible that at the time when prior mortgagee attempts to recover his debt, there is already a person who had acquired an interest in the mortgaged property for valuable consideration. If the subsequent mortgagee is allowed to exercise the right of marshalling the interest of this third person is prejudiced. Section 81 does not allow him to do so. This limitation on right of marshalling may be explained as under :

- (1) A mortgages X and Y to B.
- (2) A mortgages X to C.
- (3) A mortgages Y to D.

Here C is a subsequent mortgagee who may enforce marshalling against B who is the prior mortgagee. This would mean that he (C) would ask B to satisfy his debt only out of property Y as far as possible. But, since property Y has also been mortgaged to a third person D, the exercise of marshalling would be against the interest of D. He is not allowed to enforce marshalling.

Notice.—The right of marshalling is not subject to notice of a prior mortgage or encumbrance on the mortgaged property. The subsequent mortgagee is entitled to marshalling even if he had notice of a prior mortgage. Before the *Amending Act of 1929* the old section contained the expression, "who has not notice of the former mortgage." Therefore, before the amendment to this section in 1929, the subsequent mortgagee could claim the benefit of marshalling only when he had no notice of the earlier mortgage.

Contract to the Contrary.—The right of marshalling under this section is subject to any contract to the contrary. This right may be excluded by the parties by a mutual agreement. Such contrary contract may be express or implied, i.e., to be inferred from the circumstances. For example, two properties X and Y are mortgaged to B and thereafter property X is mortgaged to C subject to condition that C would discharge the debt due to B. Here, the condition that C would discharge the earlier debt due to B means to imply that C has not been given the right of marshalling under the debt itself. This is implied exclusion of C's right of marshalling.

82. Contribution to mortgage-debt.—Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage which deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to

secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract, to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under Section 81 to the claim of the subsequent mortgagee.

SYNOPSIS

- Meaning of Contribution.
- Nature and scope.
- Rules of Contribution.
 - Rule 1 : When Mortgaged Property belongs to Two or More Persons.
 - No Personal Obligation.
 - Rule 2 : When one Property is Mortgaged First and then again Mortgaged with another Property.
 - Contract to the contrary.
 - Rule 3 : Marshalling Supersedes Contribution.
- Distinction between Marshalling and Contribution.

CONTRIBUTION

Meaning of Contribution.—Contribution means providing money for a common fund. This section deals with the rules relating to contribution of money towards mortgaged debt. If mortgaged property belongs to two or more persons having different shares then each of such sharer is liable to contribute to the debt according to his respective share. Section 82 contemplates a situation in which there are two or more debtors who take a common loan by mortgaging different properties or their different shares in one property. Section 82 provides the rule for contribution of mortgage-money (debt) by mortgagors *inter se*. The rule is that mortgagors (debtors) are liable to contribute to the whole debt in proportion of their respective share in the property.

Nature and scope.—The rule of contribution is based on the principles of equity, justice and good conscience. Equity does not permit that in case of a common debt, any one of the debtor should be compelled to bear the burden of the whole debt. Each debtor must be liable to contribute to such common debt rateably, *i.e.*, in proportion of his respective share in the property. Contribution involves determination of the share of money required to be paid by two or more debtors who mortgage their properties jointly for a common debt. The principle is that where two or more properties of the same person or different properties of different persons are mortgaged jointly for a common debt, the mortgage-debt is one and indivisible. When two or more properties of

different persons are mortgaged to secure a loan, the mortgagee (creditor) has right to recover the debt from the property of any one person. But, if he does so, the whole burden of a common debt would lie on that very person (debtor) whose property is sold. This situation is inequitable. Accordingly, the rule of contribution provides that where the whole debt is recovered from any property, the owner of that property has right to compel other co-mortgagors to contribute in proportion to their respective share in mortgaged property. The debt under a common mortgage cannot be divided by the mortgagee (creditor). GHOSH, ON MORTGAGES IN INDIA, observes :

"It is but reasonable that in such a case, the person who is compelled to discharge the common burden should be permitted to seek indemnification from the others and, no fairer rule can be suggested than that each of them should contribute according to the value of the property owned by him or the extent of his interest in it. For, the law would not suffer the creditor to select his own victim, and from caprice of favouritism to turn a common burden into gross personal oppression."⁶⁹

Rules of Contribution.—Section 82 incorporates following rules of contribution.

Rule 1 : When Mortgaged Property belongs to Two or More Persons.—The general rule of contribution is laid down in first paragraph of this section. According to this provisions, if several mortgagors take a common loan by mortgaging their properties then they shall contribute rateably to its discharge. Since the mortgage executed by several persons for a common debt is treated as single mortgage, the mortgagee can recover the debt from any of the several properties. But, under the rule of contribution all the co-mortgagors are liable to contribute to that debt rateably, *i.e.*, according to the proportion of their respective shares in the whole property. The mortgagor from whose property alone the debt is recovered has right to compel other co-mortgagors to contribute to the debt. When the debt is common, the burden must also be treated as common.

No Personal Obligation.—Co-mortgagors are not personally liable to contribute. Under this section, the co-mortgagors may be compelled to contribute only upto the extent of their respective shares in the property. For example, A, B and C mortgage their properties jointly to D to secure a debt of Rs. 10,000. In the mortgaged property A has half share and B and C have one-fourth each. The mortgagee D recovers the debt by causing the sale of only that property which belongs to A. Under Section 82, A has a right to compel B and C to contribute Rs. 2,500 each towards the fund. That is to say, out of Rs. 10,000 A's share for debt would be Rs. 5,000 and that of B and C Rs. 2,500 each. This quantum of share in discharge of debt is in proportion of the shares of each mortgagor in the mortgaged property.

Rule of contribution as given in this section is applied also where at the time of mortgage the property is one but later on the co-sharers partition it and

69. *Ras Bahari Ghosh, THE LAW OF MORTGAGES IN INDIA*, Ed. V p. 394.

become owners of their respective shares. As discussed above, when a co-owned property is subsequently divided into several properties, the debt still continues to be common. Accordingly, the liabilities for the discharge of debt also continues to be common.

For determining the rate at which the co-mortgagors shall contribute the value of their respective share in the property is taken into account. The value is the market-value of the property on the date of mortgage not on the date when contribution is to be made.⁷⁰

Rule 2 : When one Property is Mortgaged First and then again Mortgaged with another Property.—Second paragraph of this section deals with a situation where out of two properties one is mortgaged to secure a debt and later on both properties are mortgaged to secure another debt. In such cases, when former debt is paid out of the former property then first of all, the amount of this former debt is deducted from the value of that former property. Thereafter, both the properties contribute rateably to the later debt. Thus, the contribution of the later debt too is made rateably but the ratio is calculated after deducting the former debt from the property out of which it was paid. In other words, the payment or prior encumbrance is to be made from property mortgaged first and the amount of this encumbrance is to be deducted from the value of that property in ascertaining the rateable contribution.⁷¹

Illustration

Properties X and Y each are worth Rs. 1,000 and are owned by one person. Property X is mortgaged first to A to secure a debt of Rs. 400. Then X and Y both are mortgaged to B to secure a debt of Rs. 800. Now property X is sold to C and property Y is sold to D. According to the rule of contribution given in the second paragraph, C and D shall contribute to the later mortgage of Rs. 800 in the ratio of (1000-400) to 1,000 i.e. in the ratio of 600 : 1000 or 3 : 5. Accordingly, C is liable to pay Rs. 300 and D is liable to pay Rs. 500.⁷²

If B has recovered the whole amount from property Y then D is entitled by suit for contribution to recover Rs. 300 from C who may pay it personally or give it by causing the sale of his property.

Contract to the contrary.—The provisions of Section 82 are subject to any contract to the contrary. The parties to mortgage are at liberty to modify the rule of contribution as given in this section. Where the parties agree otherwise, the contribution is to be made according to that agreement, and provisions of this section do not apply. Such agreement may be made either at the time of mortgage or at any other times subsequent to mortgage.

70. Before the 1929 amendment, the co-mortgagors were liable to contribute rateably according to market value of the property as it stood on the date of contribution.

71. *Gopal Das v. Durga Singh*, (1917) 38 LC 649.

72. The ratio of 3 : 5 means 3+5=8. In this figure the ratio would be 3 out of 8 and 5 out of 8. Hence, in a debt of Rs. 800 the ratio or rate of contribution of C and D is 300 (out of 800) and 500 (out of 800) respectively.

Rule 3 : Marshalling Supersedes Contribution.—The last paragraph of Section 82 provides that marshalling supersedes contribution. If there is any conflict between the right of marshalling and contribution, the right of marshalling prevails over that of contribution. The contribution is, therefore, subject to marshalling. This may well be explained by the following example :

- (i) Properties X and Y are owned by one person.
- (ii) Property X is mortgaged to A.
- (iii) Property X and Y both are mortgaged to B.
- (iv) Property Y is mortgaged to C.

Exercising the right of marshalling C can insist that B should recover his debt first from property X. Under Section 82, properties X and Y are liable to contribute to B's mortgage in proportion of their values after deducting from X the amount of A's mortgage. But, C's right of marshalling will prevail over contribution. Accordingly, C can require B to first recover as much of debt from X as he could from this property.

Distinction between Marshalling and Contribution.—(i) The right of marshalling is available to mortgagors. It settles the right of subsequent mortgagors *inter se*. Contribution is the right of mortgagor in cases of several properties or several shares of one property. Contribution determines the right of one mortgagor against other mortgagors, i.e., rights of mortgagors *inter se*.

(ii) In marshalling, a subsequent mortgagee requires that prior mortgagee shall recover his debt out of the property not mortgaged to him. On the other hand, contribution requires that a property which is equally liable to pay a debt shall not escape because the creditor has been paid out of that other property alone.

Deposit in Court

83.—Power to deposit in Court money due on mortgage.—At any time after the principal money payable in respect of any mortgage has become due, and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgage, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.—The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition stating the amount then due on the mortgage, and his willingness and on depositing in the same Court the mortgage-deed, and all

documents in his possession or power relating to the mortgaged property, apply for and receive the money, and the mortgage-deed, and all such other documents, so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagee either to re-transfer mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been affected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

Deposit of Mortgage-money in the Court.—The section deals with the power of a mortgagor to deposit the mortgage-money in Court. The mortgagor takes loan from mortgagee and as security mortgages his immovable property. As soon as the debt is paid the mortgage is redeemed. A mortgagor can pay the debt in any of the following manner:

- (a) By making payment of the mortgage-money or tendering (making offer) for the same directly to the mortgagee;
- (b) By filing a suit for redemption; and
- (c) By depositing the amount in the Court.

Section 83 provides for deposit of mortgage-money in the Court. The object of this section is to confer on the mortgagor a special privilege of paying the debt by depositing it in the Court so as to relieve him from other liabilities. This privilege is not available to other debtors.

The mortgagor may deposit the mortgage-money in the Court any time after the principal money payable in respect of mortgage has become due. However, this must be done before the date on which a suit for redemption is barred. Depositing debt in the Court is an easier alternative to institute a suit for redemption of mortgage. The money is to be deposited by the mortgagor in a Court where he could have instituted the suit for redemption. Deposit may be made by mortgagor himself or by any other person on his behalf.

It is necessary that mortgagor deposit full amount due on mortgage. This includes principal money i.e. actual amount of loan and interest thereon. Where no interest is due, e.g., in usufructuary mortgage, the full amount would mean only principal money.

The deposit must be unconditional. A deposit made subject to any condition or under some kind of protest is invalid. Where the mortgagor deposits mortgage-money with a condition that money is to be given to the mortgagee

only when he produces certain deeds, the deposit is not valid. In *Anand Rao v. Durghabai*⁷³ the mortgage-money was deposited in the Court but the mortgagor did not admit that the mortgagee was entitled to the money. He prayed to the Court that money should be paid only if it was proved that the mortgagee was entitled to recover the debt. It was held that this was a conditional tender and therefore not valid in law. Similarly, where deposit is made with a denial of the mortgagee's right to receive it and with a threat that legal proceedings will be taken against him if he takes money out of Court, the deposit is invalid, and does not prevent foreclosure.⁷⁴

When a valid deposit has been made, it is the duty of the Court to cause written notice to be served on the mortgagee stating the amount deposited and require his willingness to accept it in full discharge of the debt. The mortgagee is also required to deposit all the deeds and document related to mortgage.

Where the mortgage was usufructuary mortgage, before making payment to the mortgagee the Court may direct him to deliver possession to the mortgagor or any other person at his direction.⁷⁵ It is to be noted that as soon as a valid deposit is made, the interest on the principal money ceases. Normally, the possession is taken by the mortgagee in lieu of interest. Therefore, the Court must ensure that the mortgagee causes re-transfer of the mortgaged property in favour of mortgagor.

An order of deposit of money does not involve any adjudication. It is open to the purported mortgagee to accept or refuse to accept the money. In case of refusal, the purported mortgagor can sue for redemption. The order under the section does not operate as *res judicata*.⁷⁶

84. Cessation of Interest.—When the mortgagor or such other person as aforesaid has tendered or deposited in Court under Section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or in the case of a deposit, where, no previous tender of such amount has been made as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, and the notice required by Section 83 has been served on the mortgagee:

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on

73. (1898) 22 Bom. 761. See: *Mitra's TRANSFER OF PROPERTY ACT*, Ed. XIII, p. 741.

74. *Mahdian v. Jasoda*, (1884) 6 All. 399. Cited in *Mulla : TRANSFER OF PROPERTY ACT*, Ed. VII (reprint 1990), p. 555.

75. Certain mortgages are treated as "declared tenants" under statutory law, e.g., Kerala Land Reform Act, 1964. By them the delivery of possession to mortgagor is not necessary immediately upon deposit of money: See *Parthasarathi v. Krishnan*, AIR 1992 SC 1135.

76. *Biswanath Prasad Singh v. Rajendra Prasad*, (2006) 4 SCC 432.

the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in Section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to a reasonable notice before payment or tender of the mortgage money, and such notice has not been given before the making of the tender or deposit as the case may be.

When the mortgage-money is validly deposited in Court, the debt is deemed to be paid. Therefore, the interest, which is due on the debt, is not required to be paid to the mortgagee (creditor) after such deposit. Section 84 deals with the effect of deposit of mortgage-money in Court and provides that interest on principal money ceases from the date on which the principal money is deposited in Court.

When interest ceases to run

This section contemplates following two situations:

(a) Where the tender of mortgage-money has been made to the mortgagee first out of the Court and after his refusal the amount is deposited in the Court.

(b) Where the mortgage-money is directly deposited in Court without tendering the amount to mortgagee.

Section 84 provides that when the mortgage-money was first tendered to mortgagee and after his refusal it is deposited in Court, the interest ceases from the date of tender. On the other hand, when the mortgage-money is directly deposited in Court, the interest ceases as soon as the mortgagor has done everything on his part to enable mortgagee to take actual payment of money from the Court.

For the application of this section it is necessary that deposit is made according to the provisions of Section 83. That is to say:

- (i) the deposit must be valid under Section 83; and that
- (ii) the notice complete in all respects must also be served on the mortgagee. The notice being served by the Court must mention that mortgage-money has been deposited unconditionally by mortgagor. Interest will not cease merely by giving notice of deposit without any mention of the actual amount deposited in the Court.

Where mortgagee is minor, the money deposited in Court may be withdrawn on his behalf by his guardian. In the absence of any legal guardian, the guardian *ad litem* (guardian for litigation) is appointed. Under Section 84, where mortgagee is minor, the interest does not cease until the mortgagor gets a guardian *ad litem* appointed for that minor.

Suit for Foreclosure, Sale or Redemption

85. Parties to suit for foreclosure, sale and redemption.—
[Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), Sec. 156 and Sch. V.]

Foreclosure and Sale

86 to 90. [Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), Sec. 156 and Sch. V.]

Redemption

91. Persons who may sue for redemption.—Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property, namely:—

- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;
- (b) any surety for the payment of the mortgage-debt or any part thereof; or
- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

SYNOPSIS

- Persons entitled to redeem Mortgage.
- Person having interest in right to redeem.
- Surety of the mortgagor.
- Creditor of deceased mortgagor.

Persons entitled to redeem Mortgage.—Mortgagor's right to redeem the mortgage is an essential feature of the transaction of mortgage. Mortgagor is, therefore, entitled to redeem the mortgage at any time after mortgage-money becomes due. But, besides mortgagor there are other persons who are, in some way or the other, interested in the mortgage. This section provides for the right of redemption of such other persons who too are entitled to redeem the mortgage. Section 91 provides that besides mortgagor, following other persons are entitled to redeem the mortgage:

- (1) Any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon the mortgaged property or upon the right of redemption.
- (2) Any surety for the payment of the mortgage-debt or, any part thereof.
- (3) Any creditor of the mortgagor who, in a suit for administration of his estate, has obtained a decree for sale of the mortgaged property.

A mortgage is a transaction through which the mortgagor takes loan from mortgagee by putting his immovable property as security for repayment of loan. The mortgagor has right to get back this 'security' by making repayment of the debt. This right i.e. right of redemption itself is, therefore, intangible immovable property. Accordingly, the mortgagor is entitled to assign (transfer) the right of redemption to any one either by sale or by any other method. For such cases, it would be necessary that right of redemption should not be restricted only to mortgagor.

1. Person having interest in right to redeem.—Beside mortgagor, there may be other persons who may be interested either (i) in the mortgaged property or, (ii) in the right of redemption. Section 91 (a) deals with both the cases.

(i) Persons interested in the mortgaged property or having charge upon it are entitled to redeem the mortgage. Such person may be puisne or subsequent mortgagee. Since, the same property may be mortgaged to two or more persons for securing different debts, the subsequent mortgagee is equally interested in the redemption of mortgage. For instance, A mortgages his property to B. A again mortgages the same property, to secure another debt to C. Here, C is a subsequent mortgagee but he has an interest in the redemption of prior mortgage in favour of B. A prior mortgage is an encumbrance on the property mortgaged to him (C) and he must be interested in discharge of this prior burden on this property. Accordingly, such subsequent mortgagee has a charge upon the mortgaged property.

The word 'interest' includes any kind of subsisting proprietary interest in the mortgaged property. A lessee of the mortgaged property for a specified term or a permanent lessee, are the persons who have interest in the property. They are entitled to redeem a prior mortgage on the property. However the delivery of possession on redemption of a usufructuary mortgage would depend on the intention of parties. In *Cheriyian Somania v. Sundaresan Pillai Saravathy Annam*,⁷⁷ there was a prior lease of the mortgage-property in favour of lessee-mortgagee. The mortgage-deed showed that the rights of lessee were expressly saved and lease had continued even after execution of the mortgage. The Supreme Court held that the rights of lessee to continue possession would survive after redemption and the mortgagor is not entitled to recover physical possession of the property.

An auction purchaser of the mortgaged-property is also a person who has 'interest' in the property. In *Pranil Kumar Seta v. Kishorilal Bysack*,⁷⁸ the Calcutta High Court held that an auction-purchaser has right to bring suit for redemption of mortgage because he is successor-in-interest in the property; he is competent to redeem the mortgage. The Court observed further that after the mortgaged property is sold, whether voluntarily or involuntarily (i.e., in an auction-sale) the transferee becomes a successor in interest in that property.

⁷⁷ AIR 1999 S.C. 947.

⁷⁸ AIR 2003 Cal. 1.

The interest in the property must not be personal interest. An illegitimate son of joint Hindu Family having right of maintenance from that property has only a personal interest in the property. Therefore, he has no right of redemption of the mortgage of such joint Hindu property.

Mortgagor's equity of redemption is his property which he may assign it to any person. The assignee of the mortgagor's equity of redemption is also entitled to redeem the mortgage. Such persons may include the purchaser of equity of redemption, each of the co-mortgagors, and the sub-mortgagees. The execution purchaser of the whole or part of the equity of redemption is entitled to redeem the mortgaged property. The reason behind including these persons in the category of persons having interest in the mortgage property is that Section 59-A already provides that the term 'mortgagor' includes all persons who derive interest from the mortgagor.

2. Surety of the Mortgagor.—Surety of the mortgagor is a person who undertakes a guarantee that in case mortgagor fails to repay the debt, he would pay the same. A common sense rule for the transaction of debt is that in case someone stands surety for the repayment of loan the creditor may recover it from such surety. Normally, there is no need of a surety in case the debt is secured by mortgage. But, if there is a surety, he is liable to repay the debt. But, at the same time, the surety is also entitled to redeem the mortgage by making payment of debt before the mortgage could be foreclosed by mortgagee. Where, the surety redeems the mortgage by making payment of debt he would subrogate (substitute) himself in place of the creditor (mortgagee). In such cases, the surety stands exactly in the shoes of mortgagee and he may exercise all the rights which the mortgagee would have exercised in default of repayment of debt. Accordingly, the surety of the mortgagor is entitled to redeem the mortgage by paying off the debt but at the same time he is also entitled to recover it back from the mortgaged property.

3. Creditor of Deceased Mortgagor.—When a debtor dies without making repayment of loan, the creditor has to file a suit for the administration of estate and recover the debt out of the property of deceased debtor. Where property of deceased is mortgaged the creditor shall first discharge the debt under mortgage. For this reason it is necessary that the creditor of the deceased mortgagor be given the right of redemption.

92. Subrogation.—Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money which the mortgagee has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

SYNOPSIS

- Nature and Scope.
- Kinds of Subrogation.
 - Legal subrogation.
 - Piusne mortgagee.
 - Co-mortgagor.
 - Surety.
 - Purchaser of equity of redemption.
 - *Gokuldas v. Putrammal*.
- Covenant Excludes Subrogation.
- Conventional Subrogation.

SUBROGATION

Nature and Scope.—Subrogation means substitution. Any person, other than mortgagor or co-mortgagor, who having interest in the mortgaged property and who redeems the mortgage, is entitled to be substituted in place of the mortgagee. As discussed in the preceding section, where a person (e.g., surety of the mortgagor) makes payment of debt in default of mortgagor, he is entitled to redeem the mortgage. But, at the same time such person has right to recover his money from out of the mortgaged property just as mortgagee would have done had the debt not been paid by that person. In other words, the person who pays off the mortgage becomes clothed with all the rights of mortgagee. This is called subrogation or substitution of that person in place of mortgagee for purpose of redemption, foreclosure or sale.

The right of subrogation is a very old equitable doctrine and can be traced as far back as Roman Law. Since then, subrogation has been recognised in all the legal systems. In the Transfer of Property Act, subrogation was included under Section 92, by the *Amending Act of 1929*. Before this amendment, there was no statutory law in India but the equitable doctrine of subrogation existed and its principles were applied. In *Bisesswar Prasad v. Lala Sarnam Singh*,⁷⁹ the nature and scope of subrogation was explained by the Calcutta High Court in the following words:

⁷⁹. (1910) 6 Cal. L.J. 134 Cited in Shah's PRINCIPLES OF THE LAW OF TRANSFER, Ed. III p. 148.

"The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend upon the privity of contract, express or implied, except in so far as equity may be supposed to be imported into transaction and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice."

The doctrine of subrogation was being applied in England and in India as a general rule of equity. Whenever the liability of one person was discharged out of the funds belonging to another or where a person was bound to pay a debt of others for his own protection, the doctrine was made applicable to protect the interest who paid the money. In India Section 92 of the Act now incorporates well defined statutory law for subrogation. It is now no longer an equitable doctrine. All persons (except mortgagor) who have an interest in the mortgaged property or in the right of redemption under Section 91 are entitled to be subrogated or substituted in place of mortgagee (creditor).

Kinds of Subrogation.—Section 92 provides for two kinds of subrogation:

- (i) Legal Subrogation; and
- (ii) Conventional Subrogation.

Legal subrogation is a subrogation by operation of law. The facts and surrounding circumstances operate to justify in law the substitution of a person in the place of mortgagee. It is independent of any agreement between the parties. On the other hand, a subrogation is conventional if there is an express or implied agreement between the parties providing for subrogation of a person in place of mortgagee (creditor). The two kinds of subrogation, given in Section 92, are being discussed as under.

Legal Subrogation.—Paragraph one of Section 92 deals with legal subrogation. Any person (except the mortgagor) who has an interest in the mortgaged property or in the equity of redemption, is entitled to be subrogated in place of mortgagee. Such persons have legal or statutory right of being substituted in place of mortgagee for purposes of redemption, foreclosure or sale. Legal right of subrogation arises by operation of law. It does not depend on any agreement or consent of the mortgagor.

Legal subrogation is based on the equitable principle of re-imbursement. When a person is interested in making some payment which another person is legally bound to pay them, such person must be re-imbursed. A legal subrogation may arise in all such cases where a person for protecting his own interest, discharges a prior encumbrance.⁸⁰ Under Section 92 legal subrogation may be claimed by following persons:

- (a) Piusne mortgagee.
- (b) Co-mortgagor.

⁸⁰. *Gardeo Singh v. Chandrich Singh*, (1909) 36 Cal. 193 : 1 IC 913.

(c) Surety.

(d) Purchaser of equity of redemption.

(a) *Puise mortgage*.—Where the same property is mortgaged successively in favour of several persons, all such persons are entitled to redeem their respective prior mortgage. A puise or subsequent mortgagee is entitled to redeem his prior mortgage by making payments. When he does so he takes the place of that prior mortgagee. In other words, in between the mortgagees of the same property, every subsequent mortgagee has right to be substituted in place of prior mortgagee by discharging the debt due to such prior mortgagee.

Illustrations

(1) (i) A mortgaged X to B in 1990.

(ii) A mortgaged X to C in 1991.

(iii) A mortgaged X to D in 1992.

Here, the last mortgagee D can redeem the (i) mortgage executed in 1990 by making payments to B. Where D discharges the debt due to B he (D) is entitled to be substituted in place of B for all purposes of redemption, foreclosure or sale. Further, it may be noted that D can redeem the first mortgage without redeeming mortgage (ii) which is immediately prior to him. Accordingly, when D redeems mortgage (iii) he has all the rights not only against mortgage (A) but also C who is mortgagee in 1991, prior to him. Again, it is also to be noted that when D is subrogated in place of B, he (D) also gets the same priority over C in the mortgage of X which B would have if D had not taken the place of B. The result of this priority would be that if C wants to enforce his mortgage C will have to discharge the debt to D which was due to B (and which D had already paid.)

(2) (i) A mortgages X to B for Rs. 5000.

(ii) A mortgages X to C for Rs. 3000.

(iii) A mortgages X to D for Rs. 2000.

In this illustration B is first mortgagee and C and D are the subsequent mortgagees. For C, B is prior mortgagee. For D, B and C both are prior mortgagees. Under Section 92, D who is third mortgagee, can redeem mortgage (i) by making payment of Rs. 5000 to B. When D pays Rs. 5000 to B he (D) shall be subrogated for all purposes of redemption, foreclosure or sale in place of B. In other words, D shall step into the shoes of B, i.e., become first mortgagee instead of the third mortgagee. There are two effects of such subrogation. First, as against mortgage (A), D shall be treated as first mortgagee and A would enforce redemption against D. Secondly, as against C, D shall get priority over C. Accordingly, if C wants to enforce his mortgage he (C) must pay Rs. 5000 to D.

Subrogation is the right of every subsequent mortgagee. Therefore, subrogation may be claimed not only by any one mortgagee. Other subsequent mortgagee has equal right of being subrogated. Thus, in the above-mentioned

illustration (2), D can step into the shoes of B by redeeming his mortgage. Similar right is available also to C. Therefore, C too can redeem this mortgage and enter into the shoes of D. When C redeems D, C shall take the place of B and D both.

Where a subsequent mortgagee redeems a prior mortgage, he is deemed to act on his own behalf in the capacity of a mortgagee. He does not acquire the rights of mortgagee, nor does he act as agent of the mortgagee. In fact subrogation entitles a subsequent mortgagee to get priority over other mortgagees.

(b) *Co-mortgage*.—Co-mortgagor is co-debtor. That is to say, in the debt secured by a mortgage he is a sharer of the debt and his property is a part of the whole mortgaged property. Therefore, he is liable only to the extent of his own share of debt. But, if besides redeeming his own share, he pays off also the share of other mortgagor, he would be entitled to be subrogated in place of such mortgagor. In such cases, a co-mortgagor is considered to be the principal debtor for his own share and is presumed to be a surety for the co-debtors (co-mortgagors). Thus when a co-mortgagor pays off on behalf of others, he acts as surety for other mortgagors. And, if surety makes payment, he must be entitled to be subrogated in place of other mortgagor. For example, A, B and C were the co-mortgagors of property X secured for Rs. 10,000. A has half share in property and B and C each have one-fourth share in the mortgaged property. A pays off the whole debt of Rs. 10,000. Thus, besides his own share of Rs. 5000, he also discharges the debts of B and C. A is therefore, entitled to be subrogated and take place of B and C as mortgagors. The result would be that A shall step into the shoes of B and C in respect of rights and liabilities of these co-mortgagors in between the mortgagors themselves as well as against the mortgagee.

In between the mortgagors, since one co-mortgagor pays off another mortgagor's share of debt, he is entitled to claim contribution. As against mortgagee, he is subject to rights of mortgagee on behalf of that mortgagor whose debt he had discharged. Where one co-mortgagor pays off the whole debt and gets right of contribution against other co-mortgagor, the non-redeeming mortgagor also gets a correlated right to redeem his share of property and to take possession thereof on payment of his share of liability to the redeeming mortgagor.⁸¹

In *Punjab* where the Act is not in force this rule is applicable on the ground of equity, justice and good conscience. In *Ganeshi Lal v. Joti Pershad*,⁸² it was held by the *Supreme Court* that where one of the co-mortgagors redeems the

81. See *Mulla, TRANSFER OF PROPERTY ACT, Ed. VII p. 574; Paramjit Dax v. Shamsul Zoha*, AIR 2009 Pat 6, a co-mortgagor who paid the entire money was substituted in place of the original mortgagor. The legal heirs would be entitled to receive excess of their share of the mortgage amount in respect of the half share in the disputed land belonging to the plaintiff, who filed the suit for redemption of the mortgage, by way of contribution. The non-redeeming co-mortgagors would have a corresponding right to get possession of their share in the property in question from the redeeming mortgagor on payment of their share of liability.

82. AIR 1953 SC 1.

whole mortgage but pays less than the entire debt, he is entitled to claim from co-mortgagors contribution of only proportionate shares of the amount actually paid by him in respect of their shares in debt. The view that a co-mortgagor who redeems the entire mortgage is to be subrogated or treated as a mortgagor for all intents and purposes as the non-redeeming mortgagor, is not a correct enunciation of law.⁸³ The rules of law relating to redemption and subrogation by co-mortgagors being applied in Punjab are the same as applied where the Act is in force.

(c) *Surety*.—In a mortgage there may be a person who stands as surety for repayment of loan in case mortgagor fails to do so. Such surety is entitled to redeem the mortgage under Section 91. Under Section 92, when the surety of mortgagor redeems the mortgage, he is subrogated to the rights of the creditor. That is to say, where surety pays off the debt to the creditor (mortgagor), the surety stands in the shoes of that creditor. As against mortgagor, such surety has rights similar to that of mortgagor. He will be entitled to every remedy, including the rights to enforce the security, which the creditor has against the mortgagor (debtor).

(d) *Purchaser of Equity of Redemption*.—The purchaser of equity of redemption is also entitled to be legally subrogated. But, this subrogation may give rise to some confusion. It is relevant to note that equity of redemption is regarded as 'property' of mortgagor which he may assign or sell. The purchaser of such equity of redemption becomes 'owner' of this property in place of seller (mortgagor). But, in the transaction of mortgage, can he be treated as mortgagor? If yes, he shall become mortgagor who under Section 92 has no right of subrogation. If the answer is no, then how can he get back the money which he spent in purchasing the equity of redemption? This confusion was removed by the Courts by introducing the principle of *intention*. It has been laid down by the Courts that in such cases the intention of the purchaser of equity of redemption is simply to keep the mortgage alive. Such purchaser neither intends to become owner of the mortgaged property nor even a mortgagor. Facts and the law laid down in the leading case on this point are given below.

Gokuldas v. Purnamal⁸⁴

Facts : Gokuldas who was creditor of a mortgagor, purchased the equity of redemption from the mortgagor (debtor) at a sale in execution of money decree. The property was subject to a prior mortgage. Gokuldas then paid off the prior mortgage. A subsequent mortgagee sued him for possession of the property. After the sale in his favour in the money decree, the property was in possession of Gokuldas.

Held : On the basis of equitable rule of intention, the Privy Council applied the doctrine of subrogation and held that Gokuldas, the purchaser of equity of redemption, was subrogated to the rights of the mortgagee. The Privy Council observed:

"The obvious question to ask in the intervals of justice, equity and good conscience is, what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of the two ways shall be assumed to have acted according to his own interest."⁸⁵

The equitable rule of 'intention' as applied by the Privy Council in cases of subrogation of the purchaser of equity of redemption is implied in the provision of Section 92. Subrogation by purchaser of equity of redemption may be explained by the following illustration :—

(I) A mortgages property X to B.

(II) A mortgages X to C.

(III) D purchases A's equity of redemption and pays off B.

Under Section 92, D is subrogated to the rights of B. The result is that when C will enforce his mortgage, D may use the prior mortgage in favour of B as his defence.

Covenant Excludes Subrogation.—The purchaser of equity of redemption is not entitled to claim subrogation, if there is a covenant under which he undertakes to pay off the debt or discharge encumbrances. Where a person is legally bound to discharge a prior mortgage under any express or implied contract, he cannot claim subrogation because by discharging prior encumbrance he simply performs a legal obligation. A covenant for discharge of mortgage excludes subrogation of the purchaser of equity of redemption. For example, A mortgages his property first to B and then to C. Under a covenant with A, D agrees to discharge the mortgages in favour of B and C. Later on, D purchases equity of redemption from A. D then discharges B. As a general rule, D should be subrogated to the rights of B but in presence of the covenant he cannot claim subrogation. Accordingly, D would not be allowed to use the prior mortgage as a shield against C.

Conventional Subrogation.—Paragraph three of Section 92 deals with conventional subrogation. Conventional subrogation takes place when a person being stranger to mortgage, advances money to the mortgagor under an agreement that he would be subrogated to the rights of mortgagee if mortgagor redeems the mortgage form such money. The person who advances money to the mortgagor for redemption need not be interested in the mortgage; he may be stranger to the transaction. But, he must provide money to the mortgagor only for redemption and for no other purpose. It is also necessary that when the stranger advances money, there is an agreement between him and the mortgagor that when the debt is paid off from that money, such stranger would be subrogated in place of mortgagee. In the absence of any such agreement there cannot be subrogation of a person merely because mortgage was redeemed from

⁸³ *Jainal Singh v. State of Punjab*, AIR 1964 P & H 351.

⁸⁴ (1884) 10 Cal. 1035, 11 Ind. 126.

⁸⁵ See *Mulla, Transfer of Property Act*, Ed. VII p 572.

the money advanced by him. The provision regarding conventional subrogation requires that such agreement must be in writing and registered.

The last paragraph provides that the doctrine of subrogation cannot be applied unless the prior mortgage is discharged as whole. In case of partial redemption there is no subrogation. In order to avoid confusion and complication in respect of apportionment of claims, which may arise due to partial subrogation, it is necessary that redemption and subrogation both must be of the entire mortgage. Thus, subrogation does not take place unless the whole debt is discharged.

93. Prohibition of tacking.—No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by Section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

SYNOPSIS

- Rules Against Tacking.
- Subsequent Advances.

Rules Against Tacking.—Tacking means annexing or uniting one thing with the other. In mortgages 'tacking' refers to annexing a security (in mortgage) with another security. Doctrine of tacking was a rule of English law. Under this rule, when a subsequent mortgagee discharges a prior mortgage he gets priority in respect of an intermediate mortgagee as well as his original (own) security. For example, A mortgages his property first to B and then to C. He mortgages the same property to D. Now D as subsequent mortgagee discharges mortgage in favour of B and gets priority in respect of the intermediate (puisne) mortgage to C. Under the doctrine of tacking by discharging a prior mortgage in favour of B he (D) would acquire priority not only in respect of the intermediate mortgage but also in respect of his original mortgage (security).

Section 93 prohibits tacking. This section lays down that no mortgagee paying off a prior mortgage shall thereby acquire any priority in respect of his original security.

Doctrine of tacking was recognised under English law before the commencement of the *Law of Property Act, 1925*. But under this Act it was abolished in England. In India, tacking was never recognised by the Courts. Section 93 expressly lays down the rule against tacking. Therefore, when a third mortgagee pays off the first mortgage, he acquires priority only in respect of the puisne (intermediate) mortgage. He cannot annex his original security for purposes of priority.

Illustration

- (i) A mortgages X to B.
- (ii) A mortgages X to C.
- (iii) A mortgages X to D.

Here B is the *first* mortgagee, C is a subsequent (*second*) mortgagee and D is another subsequent (*third*) mortgagee. Thus C is a puisne (intermediate) mortgagee. D can redeem mortgage (i) and may claim priority in respect of mortgage (ii). Although the redemption of mortgage (i) is also redemption of a prior mortgage with respect to mortgage (iii) which is D's own security but, under Section 93, D would not be allowed to claim priority also with respect to his own or original security. In other words, for purposes of priority, the original security cannot be annexed with the puisne mortgage whether the prior mortgage has any notice of puisne mortgage or not.

Subsequent Advances.—Section 93 also provides that there cannot be tacking by a mortgagee making future advances except as provided in Section 79. Section 93 lays down that except as provided in Section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall acquire priority in respect of his security for such advance. However, tacking in respect of subsequent advance has been permitted subject to the conditions given in Section 79 of this Act. The conditions for the exercise of the right of tacking in the cases of subsequent advance are:

- (i) the subsequent mortgagee must have notice of the prior mortgage,
- (ii) the first mortgage fixes the amount to be secured.

In the absence of any of the above-mentioned conditions, tacking cannot be claimed by a mortgagee making subsequent advance to the mortgagor.

Illustration

- (i) A mortgages Sultanpur to bankers B to secure the balance of his amount with them to the extent of Rs. 10,000.
- (ii) A then mortgages Sultanpur to C to secure Rs. 10,000 having notice of the mortgage to B.
- (iii) C gives notice to B of the second mortgage
- (iv) At the date of the second mortgage, the balance due to B does not exceed Rs. 5000.
- (v) B subsequently advances to A certain money making the balance of the account against him exceeding the sum of Rs. 10,000.

Here, B is entitled to claim priority over C to the extent of Rs. 10,000. The first mortgage has fixed the maximum amount namely, Rs. 10,000 and the subsequent mortgage (C) has notice of the first mortgage. Thus, the two conditions as required under Section 79 are fulfilled. Therefore, B shall claim priority over C to the extent of the amount exceeding Rs. 10,000.

94. Rights of mesne mortgagee.—Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

SYNOPSIS

- Redeem up Foreclose down.
- English Law.

Redeem up Foreclose Down

Section 94 gives a mesne mortgagee the right to foreclose subsequent mortgagees and also the mortgagor himself. An intermediate mortgagee can enforce this right against all the mortgagees posterior (subsequent) to him and ultimately against mortgagor. Mortgagee's this right is counterpart of his right to redeem prior mortgagees under Section 91 (a). Any mesne mortgagee is entitled to redeem the prior mortgagees until he reaches the first mortgagee. These two provisions mean to suggest that a mesne mortgagee can redeem all the mortgagees *before* him and can foreclose all the mortgagees *after* him. Redemption by a mesne mortgagee is upwards (prior) and foreclosure is downwards (subsequent). Sections 91 (a) and 94 taken together, the rights of mesne mortgagee in respect of redemption and foreclosure of mortgage is very well expressed in the doctrine of *Redeem up foreclose down*.

Mesne mortgagee's rights to redeem up and foreclose down may occur only in cases of successive mortgagees. When a property is mortgaged one after the other to several mortgagees, there may be a mortgagee who stands in between two or more mortgagees. One or more mortgagees are prior to or above him and some are subsequent or below him. Such mesne or intermediate mortgagee can always redeem the prior mortgagees but, cannot redeem his subsequent or later mortgagee except by consent.⁸⁶ On the other hand, this mesne mortgagee cannot enforce foreclosure against prior mortgagee. He is entitled to enforce right of redemption upwards and foreclosure downwards. The rule may be explained with the help of following illustration :—

Illustration

- | | |
|--------------------------|---------------------|
| (i) A mortgages X to B | Redeem
↑ |
| (ii) A mortgages X to C | Mesne mortgage
↓ |
| (iii) A mortgages X to D | Foreclose |

In this illustration since C stands in between two mortgagees B and D. Therefore C is entitled to redeem B. Similarly D is also a later mortgagee. D can also redeem C or B or both. But C cannot redeem D. Similarly B cannot redeem C or D.

⁸⁶ *Chinnai Pillai v. Venkatesami*, (1917) 40 Mad. 77.

On the other hand, C can foreclose mortgagee D who is posterior below or later to him. Similarly B can foreclose C and D who are below B.

The rule is that in cases of successive mortgages, the later can always redeem the earlier but the earlier cannot redeem later except by consent. As regards foreclosure, the rule is that earlier can foreclose later but the later cannot foreclose earlier.

English Law.—Although the doctrine of 'redeem up foreclose down' is applicable both in England and in India but the English law is different from the law in India. The distinction between English and Indian law is given below.

Under English law a mesne mortgagee can redeem only the immediate prior mortgagee, *i.e.*, a mortgagee just above him. He cannot redeem the other prior mortgagee. Thus, a third mortgagee cannot redeem the first mortgagee without redeeming the second mortgagee and without foreclosing the mortgagor just subsequently to him.

In India the third mortgagee is entitled to redeem the first mortgagee without redeeming the second mortgagee who is just above him. Similarly, he can redeem the second mortgagee without foreclosing the mortgagor. The only thing necessary is that in India all these persons must be made parties to any of such suits.⁸⁷

95. Right of redeeming co-mortgagor to expenses.—Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under Section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

Co-mortgagor's Right to Expenses.—Section 95 entitles a co-mortgagor to add the expenses, incurred by him in redeeming the mortgage on behalf of other mortgagors. The expenses are to be added to the mortgage-money. It may be noted that under Section 92 a co-mortgagor is also entitled to redeem the mortgage. Such co-mortgagor may redeem the mortgage say, in order to protect his own share of property from being sold in foreclosure by mortgagee (creditor). When he pays off the mortgage-money to avoid such sale, he has a right to claim contribution from other mortgagors in respect of whose share too the co-mortgagor pays the mortgage-money. This section simply entitles such mortgagor to ask for the cost incurred by him in redeeming the mortgage. In stead of creating any separate charge regarding the additional expenses of redemption, this section gives the redeeming mortgagor to include these shares in the debt to be given to him by other mortgagors in proportion of their shares in the mortgaged property. However, this section gives to the

⁸⁷ See *D.D. Easay*, TEXT BOOK OF EQUITY, *Et. III* p. 222.

co-mortgagor only the right to add the expenses of redemption in the mortgage-money for purposes of his claim of contribution. It does not give him any other right; it does not provide that such co-mortgagor may claim substitution in place of mortgagee to the full rights of mortgagee for all the purposes.⁸⁸

96. Mortgage by deposit of title-deeds.—The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

Equitable mortgage : Mortgage by Deposit of Title-deeds.—

Mortgage by deposit of title-deeds is one of the various modes of mortgage. The repayment of loan is secured not by specifying any property of mortgagor under any written deed of mortgage but, by merely depositing the deeds of property to mortgagee. This is, therefore, a peculiar mode of mortgage. But Section 96 provides that as regards rights and liabilities of the parties, a mortgage by deposit of title-deeds is on the same footing as a simple mortgage. Thus, like a simple mortgage, a mortgage by deposit of title-deeds too can be enforced only by a suit for sale of the mortgaged property. Other legal effects including the nature of transaction are also like a simple mortgage.

97. [Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V].

Anomalous Mortgages

98. Rights and liabilities of parties to anomalous mortgages.—In the case of an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidence in the mortgage-deed, and, so far as such contract does not extend, by local usages.

This section provides that rights and liabilities of the parties in anomalous mortgage are determined under the terms and conditions laid down in the mortgage-deed itself. It is significant to note that out of the various modes of mortgage given in Section 58, an anomalous mortgage is peculiar in the sense that it is not any specific mode of mortgage. It is either mixture of two or more kinds of mortgage or is a localized customary form of securing debt. In anomalous mortgage, since there is not any specific pattern of transaction, the rights and liabilities of mortgagor and mortgagee are fixed by the parties themselves and they are included in the mortgage-deed. The provisions regarding the rights and liabilities of the respective parties, therefore, do not apply to anomalous mortgage. However the general principles of law which are inherent in the transaction of mortgage cannot be avoided by a contrary contract in the deed. For example, right of redemption is mortgagor's basic right which is inherent in every mortgage. Therefore, any agreement which, restricts or puts a 'clog' on mortgagor's right of redemption would be void whatsoever be the kind of

mortgage. In *Muhammad Sher Khan v. Raja Sethi Sajjan Dayal*⁸⁹ the Privy Council held that an agreement creating a 'clog' on redemption cannot be enforced even in an anomalous mortgage.

99. Attachment of Mortgaged Property—[Repealed by the Code of Civil Procedure, 1908 (Act of V of 1908), S. 156 and Schedule V.]

Charges

100. Charges.—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

SYNOPSIS

- Definition and Nature of Charge.
- Distinction Between Charge and Mortgage.
- Distinction Between Charge and Lien.
- Kinds of Charge.
 - Charges created by act of parties.
 - Charge arising by operation of law.
- Extinction of Charges.

CHARGES

Definition and Nature of Charge.—Where immovable property of a person is made security for the payment of money to another, and the transaction is not a mortgage there is creation of charge. The charge is created in favour of the person who is entitled to such payment. Section 100 of the Act defines charge in the following words:

"Where immovable property of one person is, by act of parties or by operation of law, made security for the payment of money to another and the transaction does not amount to mortgage, the latter person is said to have a charge on the property....."

Charge on an immovable property is created to secure payment of money. If payment is not made by the person who is liable for such payment, it is made out of the property charged for this purpose. Charge is, therefore, created for

88. *Lakshmi Pillai v. Esau Pillai*, AIR 1977 Ker. 148.

89. AIR 1922 PC 17.

securing the recovery of some money e.g. maintenance allowance, from the person whose property is so charged. Mortgage is also made to secure a certain sum of money (debt). But, in its very nature a charge is different from mortgage. Mortgage is transfer of an interest in favour of mortgagee; it is, therefore, transfer of property. Charge does not amount to transfer of any interest. When a property is charged, there is no transfer of any interest in favour of the chargeholder. The concept is that such charge-holder is simply entitled to recover his money from that property. In other words, an 'interest' in the property charged is created in favour of the charge-holder.⁹⁰ The person in whose favour a charge is created is called a charge-holder.

Section 100 while defining a charge provides, "and the transaction does not amount to mortgage". This means that charge is almost like a mortgage but, in essence it is not mortgage. Mortgage is wider than a charge. In every mortgage there is a charge, but every charge is not a mortgage.⁹¹ In *Raja Shri Sitio Prasad v. Beni Madhab*,⁹² distinguishing the nature of charge from that of mortgage, the Patna High Court, observed:

"the broad distinction between a mortgage and a charge is this: that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property."

There is very little difference between charge and mortgage in so far as the nature of these two transactions is concerned. Practical differences apart, the nature of charge differs from mortgage in the sense that unlike mortgage, charge is not transfer of interest. Accordingly, an agreement which gives an immovable property as security for the satisfaction of a debt or for the payment of a maintenance allowance without transferring any interest in the property constitutes a charge on the property and is not a mortgage.⁹³

Distinction Between Charge and Mortgage.—Charge may be distinguished from a mortgage as under:

(1) In a charge there is no creation of any interest in favour of the chargeholder; therefore, charge is not a transfer of property. Mortgage is a transfer of interest i.e. transfer of property. In other words, in a mortgage there is transfer of interest in the property mortgaged while in a charge no interest is created in the property charged do as to reduce the full ownership to limited ownership.⁹⁴

(2) In a charge there is *jus ad rem* i.e. creation of 'right of payment' out of specified property. Charge is therefore, creation of something more than a personal obligation but not a right *in rem*. In mortgage there is a right *in rem*.

(3) Charge may be created either by act of parties or, by operation of law. Mortgage is created only by act of parties.

(4) Charge cannot be enforced against a *bona fide* transferee for value without notice of the charge. Mortgage can be enforced against any transferee with or without notice of the charge.

(5) Excepting a charge created by operation of law, the charges created by act of parties must be effected through a registered document. Except mortgage by deposit of title-deeds, a mortgage must be completed by registered deed or delivery of possession as prescribed by Section 59 of this Act.

Distinction between Charge and Lien.—Like charge, lien is also a right of a person to have a claim satisfied out of the property of another. But, a lien differs from a charge in following respects:

(1) Charge is *jus ad rem* and the charge-holder is not only entitled to hold the property (if it is in his possession) until the money is paid but gives him also the right to file a suit for recovery of that money. Lien is neither *jus ad rem* nor *jus in rem* but entitles a person to hold the property until the claim is satisfied.

(2) Charge is created by act of parties or by operation of law. Lien, on the other hand, is created only by operation of law.

(3) Charge is created only on immovable property whereas lien may be in movable as well as immovable property.

Kinds of Charge.—Charges are of two kinds: (i) Charges created by act of parties and, (ii) Charges arising by operation of law.

(i) **Charges created by act of parties.**—A charge is created by act of parties when it takes place between two living persons. A charge by act of agreement is constituted by an agreement between two or more persons. Under such certain sum of money, without transfer of any interest for repayment of a particular mode of creating a charge has been provided in this Act. Therefore, the general rule as laid down in Section 9 may apply under which a charge may also be created orally. But where the agreement creating charge is in writing, it must be registered if the charge is valued Rs. 100 or upwards.

It is not necessary to use any particular words for creating a charge. It is sufficient that the document shows an intention to make the property as security for payment of the money mentioned therein. But, the document must create the charge immediately on its execution without operating as a charge at some future date. Charge must not be created on a future contingency.

An encumbrance on property has the effect of being a charge. Entering into a memorandum of understanding to sell property has been held to be not creative pursuance of the memorandum (MoU) also does not amount to creating an encumbrance.⁹⁵

90. *Dalimbi Devi v. Raghu Raj*, AIR 2002 HP 59, the owner of certain property executed a power of attorney in favour of P for the management of his property. The power of attorney provided that if the power of attorney was revoked or cancelled, P could claim expenses already incurred by him in managing or improving the lands. The Himachal Pradesh High Court held that since re-imbursement of expenses does not amount creation of 'interest' in property, any charge is not created in favour of P.

91. *Dattaraj Mote v. Anand Dattaraj*, (1974) 2 SCC 799.

92. AIR 1922 Pat. 529.

93. *Mulab Hasan v. M. Kalamani*, AIR 1933 All. 934.

94. *Mulab Hasan v. M. Kalamani*, AIR 1933 All. 934.

95. *Sardarnani Kamdappa v. S. Raju Lakshmi*, AIR 2011 SC 3234.

(ii) *Charge arising by operation of law*.—Where a charge is created without reference to any agreement or stipulation between the parties, the charge is said to be created by law. Charge by operation of law results due to some legal obligation. In other words, such charges arise under some provision of law irrespective of any agreement between the parties. For example, charge is created by operation of law under Section 55(4) (b) of this Act in the case of unpaid vendor. Similarly, such charge is created in favour of a mortgagee on surplus sale proceeds of revenue sale under Section 73 of this Act. Charge created by a decree based upon an award made on agreement out of Court or otherwise is also charge created by operation of law. A charge created by operation of law need not be registered.

A property was mortgaged for a bank loan. It was put to sale for realisation of the loan amount. The auction was on the basis of the property "as is where is". The auction purchaser ultimately purchased it after private negotiations satisfying himself about the state of the property. It could not be said that he could not know that the property was subject to the charge for payment of Commercial Tax Dues. He was not allowed to wriggle out of this liability.⁹⁶

Illustrations

(i) *A inherits certain properties from his maternal grandmother. He executes an instrument in which he agreed to pay a certain sum of money every year to his sister B out of the rents and profits of the inherited property. Charge by act of parties is created in favour of B.*

(2) *A who is co-sharer, pays the entire arrears of rent as required under some provision of law (e.g. Madras Estates Land Act). A has a charge by operation of law, on the other co-sharer's portion of property.*

Extinction of Charge.—Charges are enforced like a simple mortgage. Like a simple mortgagee, the charge-holder too can enforce his claim and recover the money by causing sale of the charged property. Similarly, the charges are extinguished in the same manner as a simple mortgage. Accordingly, the charges may be extinguished by (i) act of parties, (ii) novation and (iii) merger.

For membership of a broker of a Stock Exchange, its rules provide for deposit of securities. It has been held by the Supreme Court that securities handed over or transferred to the Stock Exchange continue to be assets of the member which can be liquidated on default. The Income Tax Deptt. would not have preference over dues of secured creditors.^{96a}

The charge may be extinguished by act of parties where the charge-holder relinquishes or releases his debt or claim to recover the money. Here, the debt exists but the charge-holder abandons his right to claim it. Charge is extinguished by novation if the charge-holder enters into any new agreement which automatically negates the effect of earlier agreement creating charge. The charges are extinguished also by merger. Merger is union of lesser interest with greater interest or union of lower security with higher security. Where the

charge-holder gets greater security including the earlier lower security, the charge on earlier lower security is deemed to be extinguished. Merger is being discussed in the following section.

101. No merger in case of subsequent encumbrance.—Any mortgage of, or person having a charge upon, immovable property, or any transferee from such mortgage or charge holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee, or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise then subject thereto.

Merger.—Merger extinguishes a charge or mortgage. Section 101 lays down the rule that when a mortgagee or charge-holder acquires the rights of mortgagor or owner of property, there is no merger if there is any subsisting interest of third person. In other words, the mortgagee or charge-holder (and also their transferee, if any) may acquire the rights in property without thereby causing merger of such charge or mortgage between himself and the subsequent mortgagee or charge-holder. In all such cases, the mortgagee is entitled to keep his mortgage alive. This section was modified by the *Amending Act of 1929*. In the old section, as a general rule, merger had the effect of extinguishing the charge or mortgage and it was only by way of exception that charge or mortgage could be kept alive by proving 'intention' of the parties. This section now enacts that there will be no merger and there is no need of applying the doctrine of intention.

The rule given in this section is that the mortgagee may keep the mortgage alive for his own defence as against puisne encumbrancer, and may claim from him the amount due under his mortgage. It may be noted that mortgage is extinguished as between mortgagor and mortgagee. The mortgagee has no rights to foreclose any puisne mortgage nor can he claim any interest after the date of his purchase or acquisition of the equity of redemption.⁹⁷ The effect of this provision is that there is no merger if any interest in the mortgaged property is outstanding and the mortgage which is redeemed can be taken as defence against any subsequent mortgagee. The rule laid down in this section may be explained as under:—

- (i) *A mortgages property X to B.*
- (ii) *A mortgages property X to C.*
- (iii) *A mortgages property X to D.*

Now, if B purchases the equity of redemption of A, the mortgage in his (B's) favour is not extinguished by merger because there are other mortgages

⁹⁶ *Singatla Impex P. Ltd. v. UCO Bank*, AIR 2012 MP 132.
^{96a} *Stock Exchange, Bombay v. V. S. Karandaguntar*, AIR 2015 SC 193.

⁹⁷ *Arjunagundam v. Narasimha*, 29 MLJ 583.

subsequent to him. Secondly, B is entitled to use his mortgage as shield against C or D or both.

Notice and Tender

102. Service or tender on or to agent.—Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general Power-of-Attorney from such person or otherwise duly authorised to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direct shall be deemed sufficient.

Provided that, in the case of a notice required by Section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit, in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Section 102 lays down the rules of procedure to be followed in respect of service of notice when it is so required. In this chapter (dealing with mortgages) notice is required to be served under Sections 69 and 83 of this Act. Section 69 provides for notice to be served on the mortgagor by mortgagee while exercising the power of sale. Section 83 which provides for deposit of mortgage-money in the Court by mortgagor makes provision for service of written notice of such deposit to the mortgagee. In all such cases where service of notice is a necessary formality, the notice must be served according to the procedure laid down in Section 102. Under Section 102, if the person on whom notice is to be served or tender is to be made, does not reside in the district in which the property is situated then, notice may be served (or tender may be made) to the agent (or duly authorised person) of the person on whom the notice is required to be served. Where agent or duly authorised person could not be found, the Court may give direction as to how such notice may be served on the person concerned. The Court would give the directions only on an application by the person who is required to serve the notice. However, where the notice is to be served for the deposit of mortgage-money under Section 83, and the whereabouts of the mortgagee or his agent are not known, such application must be made to the Court in which the mortgage-money has been deposited.

103. Notice, etc., to or by person incompetent to contract.—Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served, on or by, or tender or deposit made, accepted or taken by, the legal curator of the property of such person; but, where there is no such curator, and it is requisite or desirable in the interest, of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract, and the provisions of Order XXXII in the First Schedule to the Code of Civil Procedure, 1908 shall, so far as may be, apply to such application, and to the parties thereto and to the guardian appointed thereunder.

Section 103 provides further rules of procedure regarding service of notice. This section lays down that where the person on whom notice is to be served is not a person competent to contract (e.g. minor) the notice may be served on the lawful guardian of such incompetent person. Such lawful guardian is guardian *ad litem* who is to be appointed by the Court on a formal application being made before it. Thus, where the mortgagee is minor, the mortgagor may serve the notice on (or make tender to) the lawful guardian. In the absence of any lawful-guardian, if the mortgagor has deposited the mortgage-money in the Court under Section 83, the mortgagor has to make an application to the Court requesting it to appoint a proper person as guardian *ad litem* of the minor mortgagee. Since the purpose of this rule is to protect the interest of a minor mortgagee, it must be followed strictly. If the mortgagor deposits the mortgage-money in Court and simply asks the Court to serve the notice to minor 'under the guardianship of his father' without formally requesting the Court to appoint the father as guardian *ad litem*, there is no compliance of this rule. The service of notice or making tender would not be valid in law. The result is, therefore, that interest on the mortgage-money shall continue even after deposit of the whole amount in the Court. The mortgagor cannot be exempted from payment of interest (under Section 84). However, where there is already a duly appointed guardian of property of the minor, there is no need of making application for appointment of guardian *ad litem* of such minor mortgagee.

104. Power to make rules.—The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

V

OF LEASES OF IMMOVABLE PROPERTY

105. "Lease" defined.—A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express for implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.

"Lessor", "Lessee", "premium" and "rent" defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

SYNOPSIS

- "Lease" defined.
- Essential elements of lease.
- The Parties : Lessor and lessee.
- The demise : Right to enjoy immovable property.
- The term : Duration of lease.
- Leases in perpetuity.
- Consideration : Premium or rent.
- Agreement to lease.
- Distinction between lease and licence.

LEASES

Definition of Lease.—Section 105 defines lease. Lease is a transfer of right of enjoyment of an immovable property made for a certain period, in consideration of a price paid or promised to be paid or, money, share of crops, service or any other thing of value to be given periodically or on specified occasions to the transferor by transferee.

As is evident from the definition, lease is not a transfer of ownership in property, it is transfer of an interest in an immovable property. The interest is the right to use or enjoy the immovable property. Since 'interest' in an immovable property is considered as property, lease is a transfer of property. However, lease is a transfer of only a partial interest. It is not a transfer of absolute interest. Lease contemplates separation of right of possession from the ownership. The interest which is transferred is the right of enjoyment of property for fixed period on payment of some consideration in cash or kind. The transferor is called *lessor* and the transferee is called *lessee*. In common language the lessor is usually called landlord and the lessee is known as tenant.

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OF LEASES OF IMMOVABLE PROPERTY

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Price is called *premium* and the money, share, service or other things so given is called the *rent*.

Essential Elements of Lease.—The essential elements of lease are as under :

1. The parties i.e. transferor and the transferee.
2. The demise i.e. right to enjoy immovable property.
3. The term i.e. the duration.
4. The consideration i.e. premium or rent.¹

1. The Parties : Lessor and Lessee.—In a lease two contracting parties are necessary. The parties are lessor and lessee. Every lease is based on an agreement between two persons competent to contract. Since one cannot contract with himself therefore one cannot also grant any lease to himself.

Lessor.—The lessor, who transfers the right of enjoyment of his property must be a person competent to contract and must also have right to transfer the possession of property. The lessor must have attained the age of majority and must possess a sound mind at the time of granting the lease. The lessor must not be only competent to contract but he must have also the authority to effect lease. Lessor has authority if he is either owner of the property or, has possession of the property. In a lease there is not a transfer of ownership but transfer of only 'possession'. Therefore, not only the owner but also the lessee himself is entitled to grant lease. Lease is right to transfer possession, therefore, a person having only possession of an immovable property (i.e. lessee) is also entitled to grant lease provided it does not extend beyond such person's own possession. Lease by a lessee is called sub-lease, or derivative lease.

Minor cannot grant lease; lease executed by minor is void. Minor's guardian of property is authorised to grant lease without Court's permission for a term not exceeding five years or enuring for more than one year after minor's attaining majority.²

Lessee.—Lessee too must be competent to contract at the date of execution. Lessee must be of the age of majority and must be of sound mind. Lease in favour of a minor is void because the transfer by way of lease contemplates agreement by minor to pay rent and other obligations. Lessee may be a juristic person e.g., a company or, a registered firm. But, an unregistered firm is not juristic person. Therefore it cannot be a competent lessee. If lease-deed is executed by one of the partner on behalf of the firm, the lessee is the firm not the partner. Where lease was executed by a partner but the rent was being paid by firm, the Supreme Court held that after retirement of that partner the lease continues to exist and that there is no sub-letting by partner in favour of the firm. The firm continues to be the lessee.³

1. These requirements were stated by the Supreme Court in *B. Arund Kumar v. Government of India*, (2007) 5 SCC 745. Apart from satisfying these requirements, existence of the lease deed must also be proved. *Narain Prasad Aggarwal v. State of M.P.*, AIR 2007 SC 2349.

2. Sec. 29 (b) Guardian and Wards Act, 1890.

3. *Renukat Rani v. Pishori Singh*, AIR 1990 SC 1892.

2. The Demise : Right to Enjoy Immovable Property.—Lease is a ownership; it is transfer of an immovable property. It is not a transfer of aggregate of several interest. Ownership or absolute interest is transferred. In mortgage only partial or limited absolute interest is securing the debts. In a lease too partial or limited interest namely, the right of enjoyment of immovable property, is transferred. Lease is, therefore, transfer of limited demise. This limited estate which is right of enjoyment of property, is called demise. In a lease this right of enjoyment of property, is the subject matter of transfer. The essential characteristic of a lease is that the subject (property) is occupied and enjoyed and the corpus of which does not, by reason of the user, and is transferred after being separated from ownership. This right is a right in rem.

In a lease, the property must be immovable. Immovable property here means not only land but everything included in this term as defined in Section 3 of this Act. Thus, the property may be a house, minerals, benefits arising out of land such as fisheries, ferries or right to collect rent from a market etc. However, the property being leased out must be definite and ascertainable.

3. The Term : Duration of Lease.—The right of enjoyment must be given to the lessee for a certain period of time. The period for which the right to use the property is transferred is called 'term' of the lease. The term may be any period of time, longer or shorter, even for perpetuity. But it must be specified in the deed. The time from which the right of enjoyment begins and the time when it ends must be fixed and ascertainable. The lease may commence immediately after execution of deed or, may commence with effect from a specified future date. The date of commencement may also depend on some future event. The specific mention of the day or date is not necessary. All that is required is that duration of lease is ascertainable; it should not be uncertain or ambiguous. The extent of the period during which a lease may remain effective may be perpetuity. Such leases are termed as leases in perpetuity or, permanent leases.

An agreement for construction of a commercial complex was entered into between a corporation and a developer on a piece of land owned by the corporation. The terms and conditions stated that the right to allot shops, offices, etc., was transferred to the developer by the corporation for the specified premium amount. The court said that the intention of the parties could be inferred that the corporation had demised its land and thereby diverted itself of such right for the limited period of one year. It was proper for the collector to hold that the instrument was a lease deed and was chargeable to stamp duty as such.⁵

Leases in Perpetuity.—Leases in perpetuity are also called as permanent leases. Term is a necessary element of every lease. Therefore, where the term of

4. *Gandhari Singh v. Megh Lal Pandey*, (1918) 45 Cal 87 : 42 IC 651 ; *Johnson Kanadan v. Patel Sanu Mill*, AIR 2008 NOC 842 (Ker), a clause in the lease permitted the lessor to enter the compound to take usufruct from trees and that the lessee would have no right to the trees or their income. This showed that exclusive possession was not given to the lessee. Hence, the transaction was only a licence. Other clauses like this that sheds put up by the lessee would be removable at the time of surrender and the lessor was deemed to be always in possession, showed the transaction to be a licence.

5. *Bilaspur Infrastructure P. Ltd. v. State of Chhattisgarh*, AIR 2010 Chh 19 (DB).

a lease is neither fixed nor ascertainable by any other method, the lease may be valid only if it is a permanent lease. Permanent leases are not known in England. In India the leases in perpetuity is permissible and have been in practice since long. Such leases may be created either by express words or by necessary implication. Where the deed expressly provides that right of enjoyment is for indefinite period or, for the life of grantee or that the grant has been made in perpetuity, the permanent lease is deemed to have been made in favour of lessee. But, where the deed does not provide for a permanent grant in express words, such a lease may be presumed from an inference drawn from the surrounding circumstances and subsequent conduct of the parties. Continuing long possession may give presumption of permanent lease. If origin is not traceable then the presumption is that tenancy originated in a legal way and long possession together with payment of a uniform rent shall support this presumption. Where a tenancy has passed through several generations a permanent lease may be inferred.⁶ Where a land is held in lease for purposes of building houses or residence, the lease may be presumed to be a permanent lease. In *Chapsibhai v. Purshottam*⁷ the Supreme Court observed that in such cases a lease is a permanent lease because the rights of lessee or tenant are heritable; such leases are not intended to be only for the life-time of the lessee.

The Supreme Court emphasised that a lease deed has to be read as a whole. The Court said that the presence of an absolute discretion to resume the land without assigning any reason and absence of any express grant in perpetuity and absence of consideration militate against the deed in question being construed as a lease in perpetuity. The Court also observed that a provision for determination of the lease because of a specified breach was in no way comparable to the reservation of an absolute right to resume at will without assigning any reason in a lease without consideration. Accordingly, the lease in question was held to be not a lease in perpetuity.⁸

4. Consideration : Premium or Rent.—The contract of lease must be supported with some consideration. Consideration in a lease may be premium or rent. Where the whole amount to be recovered as consideration from the lessee is paid by him in lump sum (at one time), the consideration is called premium. For example, where A executes a lease of his land to B for one year and takes Rs. 1200/- from B before transferring the right of enjoyment to B for the said period, Rs. 1200/- is the premium. It is to be noted that apparently this may look like a usufructuary mortgage because B gets possession (and therefore enjoyment) of land for advancing Rs. 1200/- (as if loan) to A. But the transaction is nevertheless a lease and not mortgage because the land is held by B not by way of security for repayment of any loan. Premium is to be distinguished also from advance rent. Where consideration for taking possession of land is as *Salamti*, it is a premium. Single non-recurring character and payment prior to premium.⁹

Consideration paid periodically is called rent of the lease. Rent need not be necessarily in the form of money. Under this section, rent may be paid in the

6. *Ram Dutt Rai v. Laddhimi Prasad*, AIR 1941 All 51.

7. AIR 1971 SC 1878.

8. *B. Arvind Kumar v. Government of India*, (2007) 5 SCC 745.

9. *Commr. of Income-tax v. Pankaji Tea Co. Ltd.*, AIR 1965 SC 1871.

form of services rendered by lessee to the lessor. Rent may be paid also in the form of a share or crops. However, the rent fixed for the lease must be certain. It may vary from time to time but it must be reasonably ascertainable. An option to renew the rate of rents to be paid according to market value of the property from time to time does not make the rent uncertain.

Agreement to Lease.—Agreement to lease is a contract under which a person promises to grant lease on a future date. There is no transfer of possession or right of enjoyment with immediate effect. It is to be noted that lease is an agreement between two competent persons under which the lessor transfers right of enjoyment of his immovable property to lessee either with immediate effect or from any future date. Lease, therefore, transfers actual demise in favour of lessee. This is an agreement of lease. On the other hand, an agreement to lease only binds the parties for the grant of lease to become effective in future. It is a promise by one person to grant the lease and accepted by the other. Agreement to lease is an executory contract and if this contract is in writing the intending lessee is entitled to defend his possession under Section 53-A.

Landlord's self right to seek eviction.—A permanent lease with terms and conditions can give rise to relationship of landlord and tenant. The only pre-condition for establishing landlord and tenant relationship is that the landlord should reserve for himself the right to evict tenant.¹⁰ This is due to the fact that in a lease there is no transfer of ownership. This also is the main point of difference between a sale and lease. In a peculiar case, ownership over the land was not transferred. The rate of yearly ground rent and its terms were mentioned in the deed. The burden of discharging all kinds of tax was cast upon the lessee. Certain types of alterations were mentioned which the lessee was not to make. The Court construed the document as a lease and not sale.^{10a}

Distinction between mortgage and lease.—In a case before it, the Andhra Pradesh High Court stated as follows: Both are species of the same genus, viz., transfer of property, but the nature of disposition is different. Mortgage is created to provide security for repayment of a debt but without transfer of possession except when there is usufructuary mortgage or one with conditional sale. In lease, the lessee gets possession of the property for its use and enjoyment in return for lease money or rent. The rights of the parties in the two transactions are different they being linked with the basic nature of the transaction. There can be a perpetual lease but not a perpetual mortgage.¹¹

Distinction between Lease and Licence.—Lease is transfer of the right of enjoyment in an immovable property. Licence on the other hand, is the right of a person to use the land of another while it remains in possession of the latter.¹² Section 105 of this Act defines lease as the transfer of a right to enjoy

10. *Chilloor Chingith v. Padma Jeangar Murthi*, AIR 2010 SC 1278. The tenant was found in this case to have perfected his right as a tenant by adverse possession. Subsequent proceedings for his eviction were allowed because adverse possession related only to tenancy, not ownership.

10a. *Abdulk Kunnar Jain v. Board of Revenue, Cawston*, AIR 2014 M.P. 94.

11. *Gita Cotton Trading Co. v. Chief Controlling Revenue Authority*, AIR 2013 AP 129.

12. *Pirakey Oil Corpn. v. Municipal Corpn of Delhi*, AIR 2011 SC 1869, by licence no estate or interest is created. Lease, on the other hand, amounts to transfer of interest in property. Government Grants Act, 1895, is a special Act. It prevails over the T. P. Act, which is a general Act. The Government can impose its own terms and conditions on grants and other transfers. The grantee was running his own constructed petroleum installation building. He was held liable to pay Municipal tax.

an immovable property for a certain time, in consideration of price paid or promised to be paid in cash or kind. Licence is a right to do or continue to do something upon the land of another which in the absence of this right would be unlawful.¹³ The fundamental difference between a lease and licence is that in the former there is a transfer of interest in an immovable property whereas in licence there is no transfer of any interest in the property. Lease and licence both are the rights of a person to use and enjoy the immovable property of another person. But there is following points of distinction between the two:

1. Lease is a transfer of interest therefore it is a transfer of property. In licence there is no transfer of any interest; it is not a transfer of property.
2. In lease the transferee (lessee) gets a proprietary right in respect of the land. This proprietary right is called *demise* or the leasehold estate. Licence, on the other hand is a personal right of the person (licensee) using the land of another person. The right of the licensee is in the nature of a permission to do or continue to do certain things on another's land. It is, therefore, personal right.¹⁴
3. Being a proprietary right (i.e. property) lease is a transferable interest. Licence being personal right is not transferable and cannot be assigned to a third party.
4. Lessee is entitled to maintain action against any trespasser whereas the licensee cannot take action against the trespasser.
5. Lease cannot be revoked before expiry of the term and without breach of any express condition by the lessee. On the other hand, subject to certain exceptions, a licence is generally revocable.¹⁵

Although there is a clear distinction between lease and licence but sometimes the distinction is not visible. However, whether an instrument creates a right under lease or licence, is a matter of substance rather than of form. In *Associated Hotel of India v. R.N. Kapoor*¹⁶ the Supreme Court held that the real test is 'intention' of the parties. If the instrument creates an interest in the property, it is a lease whereas if it permits the grantee to make use of the property while the possession continues with its owner, it is a licence. The object of creating the right is also a determining factor. Under an agreement the State Road Transport Corporation permitted A to run a restaurant under the control of the Transport Corporation which had reserved the authority to inspect and check the management of restaurant including the right to remove

13. See Section 52 of the Indian Easement Act.

14. *P. Dilli Babu Reddy v. Government of A.P.*, AIR 2013 N.C. 55 AP, mere personal use was allowed, hence, licence not lease, right of entry into the premises was reserved. *10a0 Necessidade Roque Antonio v. Dr. Yaman Govind Lathkar*, AIR 2013 Bom 45, intention of the parties is to be gathered from the terms of the document. Exclusive possession was not parted with by the owner, hence licence, not lease. *Sardar Lalbhai Singh v. Shingalshim Trust*, AIR 2013 Utr 25, a person was making donations to the trust from time to time and also some amounts in *flow* of water and electricity. Those payments not regarded as rents, use of the premises was a licence and not a lease. *Orkhar Nath Tiwari v. State of Bihar*, AIR 2014 N.O.C 180 Pat. DB, points of difference between the two explained.

15. Points of difference stated in *Mangal Amusement Park P. Ltd. v. State of M.P.*, AIR 2012 SC 3325.

16. AIR 1959 SC 1262; See also *Pirakey Oil Corpn v. Municipal Corporation of Delhi*, AIR 2011 SC 1869, the licensee of Government land erected premises for running this petroleum business, he was in exclusive possession. The Supreme Court regarded the transaction as one of tenancy.

employees of A. It was held by the *Panna High Court*¹⁷ that A was a licensee. The fact that A was entitled to use the land for one year on payment of consideration would not make the agreement a document of lease. A Gram Panchayat granted permission to the petitioner to collect parking fees from certain vehicles at places mentioned in the notification. The court termed the transaction as a licence and not a lease.¹⁸ Where a person was allowed to run a shop at compensation of Rs. 140, possession and control of the shop was to remain with the owner, this was held to be a licence. The grant was for 11 months with a provision for cancellation.¹⁹ Where a person was looking after the property in the absence of the owner, and was also acting as his agent, for which he was permitted to use a portion of the bungalow, he was held to be a licensee.²⁰

The provision of facility for installation of conveyor belt and pipe line on a structure for moving cargo from the dedicated berth within the port to factory premises under an agreement which frequently mentioned that it was only easementary right. It was held that the grant of the right of way or easement did not amount to transfer of ownership in an immovable property. It was a licence and not a lease.²¹

In *Shafiquddin v. Pyaralal*²² a Municipal Board under a resolution gave possession of its lands to A and B with a right to make constructions on the said land subject to a condition that after termination of the lease the construction shall belong to the Municipal Board. A and B accepted the condition and made constructions on the land. The Supreme Court held that effect of the resolution and its acceptance by A and B was not to create any lease. The transaction was licence in which A and B were entitled to use the land for one year on payment of a lump sum amount. At the end of one year they were entitled to continue the possession for another term. So, it was a renewable licence rather than yearly lease. In *Alab Singh v. Shital Puri*,²³ the transaction for the use of immovable property between the parties was oral. The grantee took exclusive possession on the basis of this oral agreement and paid rents as agreed. Rent receipts were never given by the owner. It was held by Allahabad High Court that the transaction was lease and not a licence.

Where a landlord alleges that the defendant is a licensee and the defendant asserts that he is a tenant, the initial onus is upon the landlord to prove that the defendant was a licensee.²⁴

It is significant to note that there is no simple acid-test for distinguishing lease from licence. But, intention of the parties to transaction and the nature of possession is a determining factor. Where the transferee is entitled to have exclusive possession of property, it is lease. But, permission to use the land without right of exclusive possession is licence.

There was an agreement between the owner of a building and a company under which the building was given to the company for the purpose of establishing an automobile showroom. The duration of agreement was five

years with monthly fee of Rs. 1.21 lakhs. Liability for payment of taxes was on the company. It was held that no interest in the property was created in favour of the company. Only the right of enjoyment was given. Hence, it was no lease but only a licence.²⁵

For the purpose of installation of a tower by the petitioner for telephone companies, roots of the premises of private persons were taken on rent. The installation of substantial nature and once made, the space over it could not be used by the grantor and was to remain in the exclusive possession of the petitioner during the period of the agreement, viz., 116 months. Rent was to be paid periodically. The agreement was held to be a lease and not licence.²⁶

Where possession was allowed for running amusement Park, all other rights being reserved by the State of M.P. in its favour, the transaction was held to be that of licence. Provision for renewal of the licence did not make any difference in this respect.²⁷

Registration under Registration Act, 1908

The document in question was an agreement between the parties in which the terms of tenancy were defined and described. It was not found by the Court to be a lease deed. It was therefore held that registration of such agreement of tenancy was not necessary.²⁸

Distinction between licence and easement

Under a licence, the possession of some immovable property is given to the licensee for the performance of certain acts or functions. It is a limited purpose permission for use of property, e.g., to hold a circus there or an exhibition or playing, sports and games activities.

In an easement, on the other hand, there is no handing over of possession for limited purpose and time. It is rather a permanent right to enjoy a facility connected with some property, e.g., a right of way, right to air or light, etc. There is no possessory right. It is only a right over another man's ground or property.

²⁹106. Duration of certain leases in absence of written contract or local usage.—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

17. *Prakash Rao v. Bilhar State Road Transport Corpn.*, AIR 1981 Pat. 142.

18. *C. Krishna Murthy v. Govt. of A. P.*, AIR 2008 NOC 2440 (AP).

19. *Mahesh Kumar v. Kamlesh Kumar*, AIR 2008 NOC 2445 (P & H).

20. *Baramati Lal v. Yoganand Prithvi*, AIR 2008 NOC 2446 (Utr).

21. *Pandey Phosphates Ltd. v. Board of Trustees, Pundarpur Port Ltd.*, AIR 2009 Or 114.

22. *A.I.R. 1978 S.C. 298.*

23. *A.I.R. 1993 All 138.*

24. *Sanjay Kumar Chatterjee v. Hiranand Nath Ghosh*, AIR 1992 Cal. 129.

25. *Sandeep Sharma (Dr.) v. Sat Chhinn Awasthi (P.) Ltd.*, A.I.R. 2012 M.P. 98.

26. *Tata Tele Services Ltd. v. State of U.P.*, AIR 2009 NOC 857 (All).

27. *Manoj Amusement Park (P.) Ltd. v. State of M.P.*, AIR 2012 S.C. 3325.

28. *Manish Arund v. Ramnath Gupta*, A.I.R. 2012 M.P. 90, *State of M.P. v. Srinivashankar R. Poshiwal*, A.I.R. 2012 M.P. 155, tenancy on the basis of rent note, no registration is necessary.

29. Substituted by the Transfer of Property (Amendment) Act, 2002 (3 of 2002) dated 31-12-2002.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

SYNOPSIS

- Transitory Provisions (Act 3 of 2003).
- Duration of Certain Lease.
 - Agricultural purposes.
 - Manufacturing purposes.
- Composite Tenancy and Integrated Tenancy for dual purposes.
- Notice to terminate Lease.
- Service of Notice.
- Acceptance of rent after notice.
- Deposit of rent in Court.
- Contract to the contrary.
- Permissive occupancy.
- Local law or Custom to the contrary.
- Effect of redemption on tenant-mortgagee.
- Rent Control Legislations.
- Public Premises (Eviction of Unauthorised Occupants) Act, 1971.
- Lessor, unregistered partnership.
- Tenants-at-Will.
- Tenancy of Sufferance.

Transitory Provisions.—The provisions of Section 106 of the Principal Act, as amended above, shall apply to:

- (a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this (amending) Act; and
- (b) all notices which have been issued before the commencement of this (amending) Act but where no suit or proceeding has been filed before such commencement.

Note.—In place of the earlier one, new Section 106 has now been substituted by the Transfer of Property (Amendment) Act [Act 3 of 2003]. In the amended version of this section following changes have been made:

- (i) Words "expiring with the end of a year of the tenancy" and "expiring with the end of a month of the tenancy" have been omitted;
- (ii) For purposes of notice terminating the lease, the period mentioned in sub-section (1) above, shall commence from the date of receipt of such notice.
- (iii) Where a suit or proceeding is filed after the expiry of the period mentioned in sub-section (1) above, the notice under this sub-section shall not be

invalid merely because the period mentioned therein falls short of the period specified therein.

(iv) All notices issued, before the commencement of this amendment (*i.e.* before 31-12-2002), in pursuance of which suit or proceeding is either pending or, suit or proceeding has not been filed, shall be continued to be governed by the earlier version of Section 106 of the Principal Act. That is to say, the modifications or changes made herein are not retrospective.

DURATION OF CERTAIN LEASES

Duration is an essential element of every lease. The period or duration for which the right to enjoy the property is being transferred is generally provided in the lease itself by mutual agreement of the parties. Where the lease is otherwise valid except that its term is not given, the term is fixed on the basis of local law and customs, if any. In the absence of any mutually agreed term in the lease, local law or, custom in respect of its duration, the term of a lease is ascertained under the provisions of Section 106. This section also provides for termination of the leases.

In the absence of a contract, local law or usage.—The duration (period) of the lease as given under Section 106 is only where there is no contract (agreement) expressly laid down in the lease. This includes the termination of lease by expiry of the term (duration) and also the continuance of lease by renewal. In *Silanti Prasad Dey v. Shankar Mehta*³⁰ the agreement of lease provided for *expiry before term* (duration) and also its subsequent renewal of this lease. The Supreme Court held that it was an 'agreement to the contrary' within the meaning of Section 116 (holding over—continuance of lease) therefore there cannot be *implied renewal* by 'holding over' on merely acceptance of rent offered by the lessee. Moreover, the lessee had not exercised its option of renewal in accordance with the terms of said "agreement to contract" *i.e.*, before the expiry of lease. The Court observed that mere acceptance of rents by lessor on expiry of the period of lease would not amount to assent to the continuance of lease.

For ascertaining the term of a lease, this section has classified leases into two categories.

(i) *Leases from year to year*, when the lease is made for agricultural or manufacturing purposes.

(ii) *Leases from month to month*, when the lease is made for any other purpose.

The presumption of term of any lease is based on the purpose for which the lease has been effected. In the absence of any term in the lease itself or when the local law or custom is silent on the term of a lease, it is to be determined on the basis of its purpose. Two broad purposes are given in Section 106: (a) leases for agricultural or manufacturing purposes and (b) leases for other purposes.

Agricultural purposes.—Where a lease is made for agricultural or manufacturing purposes, it is deemed to be a lease from year to year. Where a piece of land is leased out for agricultural purposes it is obvious that in the absence of any specific agreement between the parties and in the absence of any

special local law or custom, the most suitable presumption could be the harvesting season of the crops which normally occurs yearly. However, although this section refers to agricultural leases but under Section 117 of this Act, such leases have been expressly exempted from the provisions of this section. The result is that presumption of yearly tenancy under Section 106 cannot be applicable to agricultural leases. This is so because agricultural tenants hold the land for unlimited period subject to performances of certain obligations relating to the tenure. The presumption of yearly tenancy, as laid down in this section, in case of agricultural leases might be inconsistent with the ordinary local conditions.³¹

Manufacturing purposes.—Leases made for manufacturing purposes too are deemed to be yearly leases. The generally accepted meaning of the word 'manufacture' is that there is production of a new or a different article. In order that a process may be treated as 'manufacturing', there must be involvement of labour or machinery for producing a commodity. After production, the article must have a different use. The article being manufactured must be so transformed that it loses its original character. There is no manufacturing purpose in fixing of a fodder-cutting machine but lease of a land for running a flour mill is a manufacturing lease. Similarly, where the knitting and cutting operations of a hosiery manufacture were carried on in the premises, the lease was held to be for manufacturing purposes.³² But, a lease for mixed purposes like dwelling, setting up of printing press and of ordinary business purposes is not a lease for manufacturing purposes.³³ Where the disputed premises were leased out for pottery business, the Gauhati High Court held that pottery business was a manufacturing process.³⁴ The onus of proving that the lease is for manufacturing purpose is on the lessee.³⁵

Leases for other purposes.—Where the purpose is neither agricultural nor manufacturing the leases are for 'other purposes'. Therefore, where the leases are made for residential purposes or for running hotel or shops or for any other purpose which could not be included in the category of agricultural or manufacturing purpose, may come under the category of other purposes.

Where lease itself and local law or custom are silent, the lease for 'other purposes' are presumed to be monthly leases, i.e., they are deemed to be month to month leases. In India the practice of letting shops and dwelling house on monthly tenancies is so common as to warrant the legislature in raising a presumption in favour of monthly tenancies it is proved by a written contract that the lease was annual one.³⁶

Composite Tenancy and Integrated Tenancy for Dual Purposes.—As regards the purposes for which any premises may be leased, there is a distinction between a composite tenancy and (b) integrated tenancy with dual

purposes. In *Nilish Nand Kumar v. Sikandar Aziz Patel*,³⁷ the Supreme Court has explained the distinction between these two types of tenancies. According to the Apex Court, a composite tenancy is a tenancy for mixed purposes. In this type of tenancy the premises are let out for more than one defined purpose but the premises are not divided or demarcated separately. That is to say, the two diverse purposes for user of premises are so blended or mixed up that they cannot be separated by dissecting the tenancy premises into compartments. Integrated tenancy, on the other hand, is a single tenancy for dual purposes. Here, the contract of tenancy is no doubt an integrated one but the premises are demarcated or divided with reference to the purpose for which they will be separately used.

The Supreme Court observed that the legal implication in the cases of composite tenancy (or tenancy with mixed purposes), need may arise for determining the dominant purpose of letting. But, 'the theory of dominant purpose of letting is irrelevant in the case of integrated tenancy (for dual purposes), when it is already known (as previously agreed between parties) that a particular portion of the premises shall be used for one purpose while another portion shall be used for another purpose.

The facts of the case were that there was one contract of tenancy but it clearly provided that out of two rooms (under one tenancy-agreement) the tenant should use the room in the front for non-residential purpose and room in backside for purpose of residence. The entire tenancy premises could not be used interchanging the users nor can the entire premises be subjected to simultaneous users as residence or commerce both, without defining which part of the premises shall be used for what purpose. Accordingly, the Apex Court held that the purpose of letting the premises clearly suggested that it was an integrated tenancy with dual purpose.

According to Section 106 as amended up to date the leases for agricultural or manufacturing purposes may be terminated by giving six month's notice. In both the cases, the leases are terminable either on the part of lessor or lessee.

However, it may be noted that the rule of quit-notice of six months for terminating leases for manufacturing (or agricultural) purposes may be applied only when the statutory requirement of a valid lease itself has been satisfied. In *Somir Mukherjee v. Davinder K. Bajaj*,³⁸ the lease was an oral lease and it was not created through a written and registered document as required under Section 107 of the Transfer of Property Act. On receiving fifteen days' notice to quit, the tenant claimed that lease was for manufacturing purpose for which six-month's notice was required. The Supreme Court held that existence of a valid lease is a prerequisite to invoke the rule laid down in Section 106 of the Transfer of Property Act. The Court observed that in this case, though the

31. *Munimulhanni Kunimulhanni v. Kizhakek Thervanthakath Chermunni Theelilji Unimolendukuly*, AIR 2009 Ker 143, lease for agricultural or manufacturing purpose, period of 5 years fixed under a void agreement, payment was being on monthly basis, it was renewed after expiry of one year, presumably for monthly tenancy though for manufacturing purpose.

32. *Jugathi Hosiery Mills v. Upendra*, AIR 1946 Cal. 317.

33. *Unmo Mill v. Harna Lal*, AIR 1973 Raj 337.

34. *Sureswar Paul v. Asim Khatun*, AIR 1995 Gauhati 41.

35. *Idnunes v. Anunt Kanthamun Pihok*, AIR 1982 SC 127.

36. *Arnechella v. Ramnath Nair*, (1907) 30 Mad. 109, cited in *Mulla's TRANSFER OF PROPERTY ACT*, Ed. IX, p. 1078.

37. AIR 2002 SC 3073 : The case related to the eviction of the tenants under the Bombay Rents, Hotel Lodging House Rates Control Act, 1947.

38. AIR 2001 SC 1696.

tenant has claimed that it was a lease for manufacturing purpose, there was no registered written lease as required under Section 107 of the T.P. Act. Accordingly, the Apex Court held that lease was terminable not by quit-notice of six-months as laid down under Section 106, and the fifteen days notice terminating tenancy is a valid notice.

Notice to Terminate Lease.—This section provides for the requirement of notice by lessor or lessee whosever wants its termination. For termination of yearly tenancy six months notice and, for monthly tenancy fifteen days notice is necessary. The requirement as to notice has been provided to enable the tenant to gather up the fruits of his labour or make necessary arrangements before quitting. Notice to quit is, therefore, a necessary prelude to legal determination of tenancy. Formerly notice was required to have the effect of terminating the lease at the expiry of six months with the end of a year or at the expiry of fifteen days with the end of a month. But now Section 106 has been amended by the Transfer of Property (Amendment) Act, 2002 (Act 3 of 2003).³⁹ In the amended version of this section words, "expiring with the end of a year of tenancy" and "expiring with the end of a month of tenancy" have been omitted. The result is that now the tenancies may be terminated at any time after giving the notice. The new section now expressly provides that such notice shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified in this section, where suit or proceeding is filed after expiry of the period as mentioned in sub-section (1). It is also to be noted that the period mentioned in sub-section (1) shall commence from the date of receipt of notice.⁴⁰

It was a fact that a notice did not mention any time or exact date for terminating the tenancy does not invalidate the notice provided that the suit is filed after expiry of the notice period from the date of receipt provided under the Act.⁴¹

39. Section 106 was amended in Uttar Pradesh by the U.P. Act XXIV of 1954. The words "expiring with the end of a year of tenancy" and "expiring with the end of a month of tenancy" had been omitted for this State. The result was that in this State tenancies could be terminated at any time after giving notice. This has now become the law for the whole country except where the Transfer of Property Act is not applicable.

40. *Pannalal Sagarmal v. Central Bank of India*, AIR 2008 Cal 285; *Vijender Kumar Sharma v. Cognit E&R Solutions*, AIR 2009 NOC 3017 (Del.), as per lease deed, the lease was terminable by a mere notice and forthwith, that meant by the end of the month of tenancy, the provision and notice were valid. *Mritunjay Seth v. Jodhmal Bask*, AIR 2011 SC 2396, the question whether English Calendar was to be taken or Bengali, evidence of the landlady was not recorded during her lifetime, but that of the tenant was recorded, accordingly his version of English calendar prevailed. *Tanusev Mulherjee v. Mihir Chinnai*, AIR 2013 NOC 218 Ori, termination is at the discretion of the lessor, fifteen days commence from the date of service of notice.

41. *Renu Gupta v. Kanti Deol*, AIR 2013 All 26; *Ajay Kumar Singh v. Dasa*, AIR 2013 Cal 125, 30 days of notice required under agreement, but only 15 days notice given, suit was filed after expiry of 30 days, held competent. *Lakshmi Narayan Gupta v. Secy, Kharli Gramadhyog Vikar Mandal*, AIR 2014 Utr. 14, unregistered document, required 3 months notice, not binding, 30 days notice given was proper. *Shree Kam Urban Infrastructure Ltd. v. Court Receiver, High Court of Bombay*, A.I.R. 2014 SC 2286, quit notice fell short of the specified period, suit filed 6 months after notice, not invalid. *Bhargavimani v. Perti Marthaman Devasthanam*, A.I.R. 2014 NOC 454 Mad, short fall in notice, notice not invalidated, landlord not estopped from claiming relief of possession.

A lease of immovable property exceeding one year can only be made by a registered instrument. The tenant in this case failed to draw a registered instrument after expiry of five year term of the lease. He also did not file a suit for specific enforcement of renewal. He merely continued to pay rent. It was held that he became reduced to the status of tenant by holding over. The tenancy was therefore deemed to be month to month tenancy. It could be terminated by notice under Section 106.⁴²

Notice to be served by lessor or lessee for termination of lease must be in writing, signed by or on behalf of the person giving it. Notice given by sons on the death of their father has been held to be valid. A notice to quit given by a person who has the general authority of the owner to deal with his property has also been held to be valid. The notice to quit ensures for the benefit of successors-in-title of the lessor. Where there are more than one lessor, a notice has to be given on behalf of all of them. Common notice of co-shares was held to be not contrary to Section 106.⁴³ Such notice must be definite and unconditional and must indicate a clear intention of termination of tenancy after expiry of the notice. The terms of notice must not be conditional and vague.

The notice has to be a formal declaration of the lessor's intention to put an end to the lease. It is not necessary that the tenant should have defaulted in payment of rent nor any other ground for eviction has to be stated.⁴⁴ The notice making out a larger case than what the plaintiff pursued was held not to render it vague or indeterminate.⁴⁵

Notice for terminating a tenancy is not required to be served on sub-tenant. The court said that sub-tenants are at best proper parties to eviction proceedings.⁴⁶

No notice is necessary where the tenant denies the title of the landlord.⁴⁷

42. *S. Rajiv Singh v. Punchip Associates P. Ltd.*, AIR 2008 Del 56.

43. *A. S. Krishna Murthy v. C. N. Reddanna*, AIR 2009 NOC 2692 (DB).

44. *Syed Musajib Hissin v. A.D.J.*, (Court No. 13), *Agre*, AIR 2012 NOC 344 All.

45. *ETC Holdings Ltd. v. Calcutta Dock Labour Board*, AIR 2008 NOC 1413 (Cal); *Pannalal Sagarmal v. Central Bank of India*, AIR 2008 Cal 285, notice did indicate the intention to terminate the lease, not good. But the court could give a fresh notice. *Dhanraj Pal v. Harbans Singh*, (2006) 9 SCC 216, objections as to validity or sufficiency of notice should be specifically raised in the written statement otherwise the objection would be deemed to have been waived. In the absence of a specific plea in the written statement about the objection, the tenant would be taken to have waived the objection and therefore could not be allowed to be urged before the court. In this case, one rectal in the notice terminated the tenancy from the date of notice and the other case, one rectal from 15 days after service of notice, the court said that rectal was in accordance with the law, but the objection had become waived. *Banidhar Machinery P. Ltd. v. On Prakash Sikka*, AIR 2009 Del 33 (DB), objection as to sufficiency of notice not averred in the written statement. The notice had not become invalid because the suit was filed much after the stipulated period of 15 days. Where tenancy expires by efflux of time, no statutory notice is required.

46. *S. Rajiv Singh v. Punchip Associates P. Ltd.*, AIR 2008 Del 56.

47. *Velu Thevar v. Subbiah Pandayan*, AIR 2009 NOC 590 (Mad). *Devi Dayal Sharma v. Ramnesh Kumar Agrawal*, AIR 2009 Ori 19, the property in question was ancestral joint family property and the plaintiffs were co-shares, the plea of the defendant throughout that the plaintiffs were not his landlords and thus denial of landlord-tenant relationship, complaint about notice not allowed.

Service of Notice.—The notice to terminate a tenancy must be duly served on the party intended to be bound by it. Notice may be served by any of the modes given in the section. The section provides that a notice may be sent by post to the party who is intended to be bound by it or, may be delivered to him personally. Such notice may also be given to his family members or servants and, ultimately, if nothing is possible, the notice may be affixed to a conspicuous part of the leased property.^{47a} In *Kulkarni Patil v. Vasant Baburao Ashtekar*⁴⁸ it was held by the Supreme Court that in case of a company, notice, as required by Section 106 of the Act, could be sent by registered post in the name of the company.

Any objection to the validity of notice to terminate tenancy under Section 106 should be raised specifically and at its earliest. In *Parwati Bai v. Radhika*,⁴⁹ the receipt by the defendant was admitted in the written statement but he did not raise any specific objection as to the validity of the notice. The Supreme Court held that any objection to the validity of the quit-notice should be "raised specifically and at earliest, otherwise the objection would be deemed to be waived".

Where a tenancy is joint, a notice to any one of the tenants is sufficient and good for his eviction. In *Abdai Sattar v. Ramshomar*,⁵⁰ the Supreme Court held that where out of several tenants certain tenant receives notice in capacity of 'general power of attorney holder' on behalf of all tenants, there is service of notice on all the tenants.

Where the original landlord died and the property was inherited by his wife and son and the tenant accepted both of them as his landlords, a notice served by the son alone was held to be good.^{50a}

Where the notice of eviction is sent by registered post with acknowledgement due and the acknowledgment is received back with recipient's signature, there is a presumption that the addressee has received the letter in due course of business and the notice is deemed to have been served.⁵¹ Publication of a notice in newspapers or telephonic notice is no notice under Section 106 of the Act.

Where the notice came back with the remark "not claimed/not met", it was held to be sufficient to prove deemed service of notice. There was no evidence to

47a. *Dasi v. Ajay Kumar Singh*, AIR 2014 NOC 151 Cal DB, a notice so affixed.

48. AIR 1992 S.C. 1097, V.G.K. Design & Development Engrs. P. Ltd. v. H.N. Narayana Reddy, AIR 2008 NOC 739 (Kar), the company refused to accept notice sent under registered post, but summons sent at the address of the premises were accepted. The court said that merely because the notice of termination is not addressed to the registered office of the company, it was not bad at law. The tenant's plea that huge amounts were spent on repair and upkeep of the premises should be adjusted towards rent was not accepted because consent of the landlord was not shown to be there.

49. AIR 2003 SC 5995.

50. AIR 1992 S.C. 2065.

50a. *Narain Kedia v. Prasanna Kumar Putnamk*, AIR 2014 NOC 203 Ori, similarly, it is not necessary that all the co-tenants should be made parties to the suit.

51. *Green View Radio Service v. Laxmibai Ranji*, AIR 1990 S.C. 2156.

rebut the presumption of service of notice. The notice was valid and regarded as presumed to be served.⁵²

Acceptance of rent after notice.—An eviction suit was filed because of arrears of rent. A notice was issued determining the tenancy. The notice stated that whatever payments the defendant lessee would make after receipt of notice would be received by the lessor under protest. It was held that in these circumstances that the mere acceptance of the rent amount after issuing of eviction notice would not have the effect of waiver of notice.⁵³ Where the landlord filed the suit for eviction even after accepting rent after giving notice, to quit, it was held that neither there was revival of the tenancy, nor waiver of the notice.⁵⁴

Lessor's right.—It is the lessor's right to such eviction by notice and by following due process of law. Even where the Customs Authorities have to make seizure of the premises for recovering dues, they cannot just give notice to lessee and ask for eviction. They too have to follow the prescribed procedure. The Court quashed such notice.⁵⁵

Deposit of rent in court.—After filing of an eviction suit against him, a tenant cannot be permitted to deposit arrears of rent in the court in order to avail relief under Section 114 of TPA.⁵⁶

Contract to the contrary.—The requirement of the notice under this section is subject to any contract to the contrary. Where there is any express contract between the parties as to giving notice to quit, the parties are governed by that contract and this section does not apply. There may be a covenant in the lease for a term of one year that tenant must vacate the premises as soon as the lessor desires, in which case no notice would be necessary as required under Section 106. In other words, where the tenancy is to be terminated after expiry of the term fixed by the parties themselves, the tenant is 'not entitled' to any statutory notice to quit.⁵⁷ If there is a contract giving option to the landlord to terminate the lease under specified conditions, the heirs of the landlord can determine (terminate) the lease according to the contract without giving notice. Similarly, no notice is necessary when the lease provides for eviction in default of payment of rent for two consecutive months. Where the lease-deed itself provides a fixed term tenancy, notice to quit cannot be given before expiry of

52. *Vandana Gulati v. Girraj Singh*, AIR 2013 All 69; *Kamat Prammank v. Indrajit Bindupalliyu*, AIR 2013 Cal 60, notice not deemed to be served as postal preon's remark "refused". *Ajay Kumar Singh v. Dasi*, AIR 2013 Cal 125, *Radha Krishan v. Radha Devi*, AIR 2014 NOC 587 Raj, registered notice came back with the remark "not claimed", effective notice.

53. *Nazari Kun v. Vijaynagar Welfare Association*, AIR 2008 NOC 1646 (AP), *Raj Kram Kalamantar P. Ltd. v. Jagadishore Bansiddi Gundadri*, AIR 2006 NOC 1647 (Bom), mere acceptance of rent by the landlord after service of notice would not amount to waiver of the intention to terminate the tenancy.

54. *Smitu v. Mahesh Dighambar Jain Mandir*, AIR 2012 All 157; *Uttam Chand Gupta v. New India Assurance Co. Ltd.*, AIR 2014 NOC 115 All, to the same effect.

55. *Aditya Birla Nino Ltd. v. Union of India*, AIR 2013 NOC 359 Bom.

56. *Gopinath Muthukar v. Utham Bharati*, AIR 2009 Cal 58.

57. *P.S. Bati v. Project & Equipment Corpn. of India Ltd.*, AIR 1994 Delh 255.

that term. In *Sri Ram Krishna Theatres Ltd. v. G.I. & C. Corpn. Ltd.*,⁵⁸ the Karnataka High Court held that where a tenant obtained some land on a term lease along with a building thereon, the landlord would not be entitled to seek eviction before expiry of the period of lease by giving notice to quit.

Permissive occupancy.—The question was that of recovery of possession from the hands of permissive occupancy. No landlord and tenant relationship was in existence. The parties being close relatives, the defendants was allowed free occupancy of the premises. The Court said that the right of eviction by notice under Section 106 could not be invoked. The letter cancelling the permissive occupation was valid. The defendant was directed to vacate the premises.⁵⁹

Local law or Custom to the Contrary.—There are certain local laws and customs which govern tenancies as to notice to quit. Under Section 106, the presumption as to duration of leases is subject to also the local law or custom. Notice under this section is, therefore, also in the absence of any contrary local law, custom or usage. For example, in West-Bengal leases locally named as 'Chakaram' or 'Chattral' may be terminated only according to local custom prevailing there, not under the provisions of this section. Similarly, in Bombay there is local usage that month to month tenancy of houses can be terminated by giving one month's notice instead of fifteen days' notice as required under this section. In *Calcutta*, a tenant held the premises after expiry of the three years duration of lease. It was held that after expiry of the term, the possession of tenant was monthly tenancy and each month of tenancy expires on the midnight of the first day of the succeeding month.⁶⁰

In Punjab where this Act is not enforced it has been held that rules contained in Section 10 are technical rules and cannot be applied as rules of equity, justice and good conscience. Accordingly, in Punjab the requirement of fifteen days' notice to quit need not necessarily terminate strictly with the end of the month of tenancy.⁶¹

Effect of redemption on Tenant-Mortgagee.—Where a mortgagee is in possession of the property and tenancy is also created, redemption of mortgage by mortgagor (landlord) would not terminate the lease automatically. Except where the intention being to the contrary, the normal rule is that mortgage and lease operate independently of each other. After redemption of the mortgage, the lease revives.⁶² In *Nirmal Chandra v. Vimal Chandra*,⁶³ the facts were that the mortgage-deed provided that mortgage-money and the rent payable by tenant shall be equal and that the landlord (mortgagor) on redemption

would himself use the mortgaged property for a period of three years. The deed also provided that if the property was given on rent to someone else, the mortgagee shall have the right to take back the possession as tenant. The Supreme Court held that if tenant is mortgagee with possession, the tenancy is not terminated automatically on redemption of the mortgage, unless the contrary intention is inferred from the mortgage-deed. The Apex Court observed further that in this case the condition that if the property is given on rent, the mortgagee shall have the right to take back possession as a tenant, cannot be said to be a 'clear intention of surrendering lease-rights'; the lease continues. The Court observed further that relief of possession to landlord (Mortgagor) cannot be granted also in view of the Rent Act.

Rent Control Legislations.—In view of acute housing problem, especially in the urban areas, most of the States have enacted Rent Control and Eviction Acts in order to protect the tenants from unnecessary harassment of their landlords. These Acts may be regarded as local laws. Section 106 of the Transfer of Property Act is made applicable in the absence of any local law to the contrary. Therefore, in cases of conflict between the provisions of Rent Control Acts and Section 106, the Rent Control legislation is to be made applicable not Section 106.

In *Dhannpal Chatter v. Vesdai Ammal*,⁶⁴ the Supreme Court held that in order to get any decree or order for eviction against a tenant under the State Rent Control Acts it is not necessary to give notice under Section 106. Where the tenant is bound to vacate the house under the Rent Control Act, it is not obligatory to originate the proceedings on determination of lease by notice under Section 106. The Court further observed that the object of Section 106 is merely to terminate the contract whereas the object of the Rent Acts is to safeguard the interest of tenants by not allowing the tenancy to be terminated.

A case arose before the Bombay High Court under the Bombay Rents and Lodging House Rates Control Act, 1947. A cinema hall was given on lease. The lease was alongwith furniture, fixtures and machinery necessary for exhibition of films. The lessee was not required to have any equipment on his own to make the theatre viable for running the business of exhibition of films. It was held that the dominant purpose would seem to be to let out the business of exhibition of films. The use of the building was only incidental to such business. The arrangement as to premises was outside the purview of Sections 5 (8), (8A) of the Act. The termination of the lease as per the provisions of Section 106 of the Transfer of Property Act was valid.⁶⁵

Public Premises (Eviction of Unauthorised Occupants) Act, 1971.—Land belonging to the Union of India under the management and control of the Military Estate Officer was held to be public premises within the meaning of Section 2 (e). The old grant and the rights of the grantee were determined by resumption of the land by the Union of India as per terms of the General order of

58. AIR 1993 Kant. 90.

59. *A. Valliammal v. Jayanthi*, AIR 2009 Mad. 182.

60. *Sushil v. Birendrajit*, AIR 1934 Cal. 837.

61. *Chiranjil Lal v. Naman Singh*, AIR 1972 P. & H. 432.

62. *Hindlison Essar South Ltd. v. Union Bank of India*, AIR 2008 14, a tenant cannot be thrown out by the secured creditor even after the mortgage has ended. The mortgagee bank could take only symbolic possession of the premises.

63. AIR 2001 SC 2284.

64. AIR 1979 SC 1745.

65. *Rajkumar Kola Manulir P. Ltd. v. Jagatishore Bansilal Gindola*, AIR 2008 NOC 1647 (Bom).

the Governor-General in Council. The entitlement of the petitioner tenant to occupy the premises came to an end and he became an unauthorised occupant. The order for eviction passed by issuing notice under Section 4 of the 1971 Act was held to be not illegal. Notice under Section 106 of TPA was not necessary.⁶⁶

Lessor, unregistered partnership.—An unregistered partnership filed a suit for recovery of vacant possession and *mesne profits* from its lessee. The suit was resisted on the ground that it was incompetent, the firm being not registered. The Court allowed the suit because the disqualification under Section 69 (2) of the Partnership Act is in respect of enforcement of contractual rights, whereas the suit in this case was for enforcement of a statutory right.⁶⁷

Tenants-at-will.—Tenancy-at-will has not been defined in the Act. It is tenancy where no fixed term has been specified as its duration but it may be terminated any time at the will of the lessor or lessee or both. Where a land or tenement is let by one man to another to hold at the will of the lessor, the lessee is called tenant at will because he has no certain or sure estate; the lessor may put him out at any time he pleases.⁶⁸ If the stipulation of Kabuliya provides that the tenant was at liberty to vacate the premises at will, it was held that the tenancy was terminable at the will of also the landlord.⁶⁹ Tenancy-at-will arises by express agreement between the parties or by necessary implications. Where a tenant has possession of a property with the permission of the landlord or with his implied consent, he is a tenant-at-will by necessary implication. Tenancy-at-will is, therefore, not a lease for any definite duration, it is for uncertain period of time. Neither party is sure about the duration of the lease.

When the lease provides for tenancy-at-will, there is 'contract to the contrary' as regards duration of the lease; therefore Section 106 is not applicable. Accordingly the landlord may ask the tenant to vacate the premises any time by giving one month's notice.

Tenancy of Sufferance.—Where the tenant continues to hold the possession even after the expiry of the notice to quit, the tenant is not in legal possession of the tenanted property. In such situation, the tenant may be treated as a trespasser. But, law does not penalise such tenant by treating him a trespasser and he is regarded as a tenant at sufferance who continues the possession as 'holding over' the property without any legal right. A tenant at sufferance may be asked to vacate the premises without any notice.

Arbitration clause.—The existence of an arbitration clause in the lease agreement does not put to an end to the right of eviction. This is so because on the completion of the lease period, all rights under the lease come to an end including arbitration clause.^{69a}

66. *Virgin Kumar v. Union of India*, AIR 2008 NOC 1995 (All).

67. *Yessy Foodols v. P. A. Moses*, AIR 2009 Kar 103.

68. See Woodfall's LAW OF LANDLORD & TENANT, p. 280.

69. *Narain Kumar v. Onkar Nath Agrawal*, AIR 1973 All 257.

69a. *Master Pieces Furniture P. Ltd. v. K. Lakshmi Reddy*, AIR 2014 AP 56.

107. Leases how made.—A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :

Provided that the State Government may, from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

SYNOPSIS

- Modes of Creating Leases.
- Leases for a term exceeding one year.
- Lease reserving yearly rent.
- Permanent Leases.
- Other Leases.
- Execution by Lessor and Lessee.
- Effect of non-registration.

MODES OF CREATING LEASES

Section 107 provides for the modes of making leases. Like other transfers, certain formalities are necessary also for completing a lease. This section provides for two modes of creation of leases :

A. Leases which can be made only by registration—

- (a) Leases from year to year.
- (b) Leases for a term exceeding one year
- (c) Leases reserving an yearly rent.
- (d) Permanent leases.

B. Leases in which registration is optional :

- (a) Leases from month to month.
- (b) Leases for a term of one year.
- (c) Leases for a term of less than one year.

The Indian Registration Act, 1908 also makes similar provisions regarding the registration of leases. Under Section 17, the leases mentioned in group (A) are compulsorily registrable. The leases grouped in (B) may be made either by registered instrument or by delivery of possession.

Leases from year to year.—Where the lessor has no right to determine (terminate) a lease at the end of a year without giving notice, the lease is from

year to year. That is to say, a lease from year to year is continuing lease. Unless terminated by a notice to quit, the lease from year to year may last indefinitely. Such leases arise by operation of law whenever a person is in possession of an immovable property with the permission of landlord and such person pays the rent yearly. Year to year leases must be made through a registered document.

Leases for a term exceeding one year.—In cases where the term of a lease has been fixed exceeding one year, registration is compulsory. A lease of a fishery, i.e., right to catch fish is a lease of an immovable property; therefore if such lease is made for a term exceeding one year, it must be registered. Lease of a house for an indefinite period for carrying out some business at a rent to be settled on the basis of percentage of income accumulated after fifteen months was held as a lease exceeding one year which is compulsorily registrable.⁷⁰ A lease made for the life of the lessee is a lease for a term exceeding one year and must be registered. In *Rajendra Pratap Singh v. Rameshwar Prasad*,⁷¹ the Supreme Court held that a lease for a term exceeding one year must be through a registered instrument. But signing of instrument by both lessee and lessor is not *sine qua non* for its validity. What is essential is its joint execution.

Leases reserving yearly rent.—Where the rent of a lease is reserved for the whole year, there is a presumption that it is from year to year lease. As discussed earlier, such leases are compulsorily registrable.

Permanent Leases.—Permanent leases too are compulsorily registrable. Whether a lease is permanent or not, depends on terms laid down in the deed and the object and the circumstances under which the lease was created. Normally, following two circumstances may raise presumption of a permanent lease: (i) that no term is fixed in the lease and, (ii) that the instrument of lease contains a provision for exercise of certain rights by legal heirs of lessor and lessee after their death.⁷²

Other Leases.—Leases other than the abovementioned are leases for a term of one year or for term less than one year and, the leases from month to month. Second paragraph of this section provides that such other leases may be effected either by registered instrument or by oral agreement followed by delivery of possession. Thus, registration of these leases is optional. Writing too is not necessary and oral agreement accompanied by delivery of possession is sufficient to effect the lease. However, for the *State of Uttar Pradesh* following amendment has been made in the second paragraph of Section 107:

"All other leases of immovable property may be made either by registered instrument oral or written accompanied by delivery or possession."⁷³

Execution by Lessor and Lessee.—Lease is an agreement between two competent parties under which the owner of a land transfers the right of enjoyment in immovable property to another person for a certain duration. Therefore, where the lease is required to be made through a registered deed, the deed must be executed by both, the lessor and the lessee. A written and registrable lease is invalid if it is not executed by both the parties. But,

70. *Delhi Motor Co. v. Bannurkar U.P.*, A.I.R. 1968 SC 794.

71. A.I.R. 1959 SC 37.

72. *Committee of Income-tax v. Vessahar Singh*, A.I.R. 1940 Pat. 24

73. See Uttar Pradesh Civil Laws (Reforms and Amendment) Act 1976, section 31.

execution by lessor and lessee both is necessary only where the lease of immovable property is made by a registered deed.

Note.—The above-mentioned provisions which are contained in paragraph three of this section have been omitted by the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976. This amendment omits also the proviso to this section. Accordingly, paragraph three and the proviso to Section 107 is not applicable in the State of Uttar Pradesh.

Effect of Non-registration.—Where a lease is compulsorily registrable but has not been registered, the lease is invalid. If the registration of a lease is necessary under Section 107, the provision for its renewal shall not affect the requirement of its registration when a registered lease is further renewed. In other words, a covenant for renewal contained in a lease does not *ipso facto* extend the tenure of the lease. If to the renewed lease, the requirements of registration are compulsory, no valid lease would come into existence unless registration is made.⁷⁴ Such unregistered lease becomes a monthly tenancy and terminable as such.⁷⁵ A lease deed which was not registered and was also not adequately stamped was tendered in evidence. The Court held that it could be used as evidence for collateral purposes.⁷⁶

However, a person holding possession under an unregistered lease (which is invalid) is not a trespasser; he is treated as tenant-at-will. The lessor is entitled to receive rents or compensation from such tenant. Such rent is recoverable by means of legal action.⁷⁷ An unregistered lease, though invalid, is sufficient basis for a suit for the specific performance under Section 27-A of the Specific Relief Act. Further, a lessee holding possession under an unregistered lease may defend his possession under Section 53-A (part-performance) of this Act.

108. Rights and liabilities of lessor and lessee.—In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:

(A) *Rights and Liabilities of the Lessor*

- (a) the lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is, and the latter is not aware, and which the latter could not, with ordinary care discover;
- (b) the lessor is bound on the lessee's request to put him in possession of the property;
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and

74. *Hindustan Petroleum Corp. Ltd. v. Vannilal Kanman*, A.I.R. 1992 Mad. 190; *Bandini Machinery P. Ltd. v. Om Prakash Sika*, A.I.R. 2009 Del. 33 (DB), an extension of lease not made by registered instrument, it is for the lessee to establish the purported oral lease.

75. *Kampanniah v. Allied Motors Service Station*, A.I.R. 2012 Kar. 100.

76. *Chunprakash Thakur v. Niranjani*, A.I.R. 2012 M.P. 112.

77. *Amreshwar v. Sayed Ismail*, A.I.R. 2012 S.C. 3320.

performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) *Rights and Liabilities of the Lessee*

(d) if during the continuance of the lease an accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it, with interest from the rent, or otherwise recover it from the lessor;

(h) the lessee may even after the determination of the lease, remove, at any time whilst he is in possession of the property leased, but not afterwards all things which he has attached to the earth; provided he leaves the property in the state in which he received it;

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress together and carry them;

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may

again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take of which the lessee is and the lessor is not, aware, and which materially increases the value of such interest;

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in, at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;

(g) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

SYNOPSIS

- Rights of Lessor.
- Liabilities of Lessor.
 - Duty to disclose latent material defect.
 - Duty to give possession.
 - Covenant for quiet enjoyment.
- Rights of Lessee.
 - Right to accretions.
 - Right to avoid lease on destruction of property.
 - Right to deduct cost of repairs.
 - Right to deduct outgoings.
 - Right to remove fixtures.
 - Right to remove crops.
 - Right to assign his interest.
- Liabilities of the Lessee.
 - Duty to disclose facts.
 - Duty to pay rent.
 - Duty to maintain the property.
 - Duty to give notice of encroachment.
 - Duty to use the property reasonably.
 - Duty not to erect permanent structure.
 - Duty to restore possession.
- Notice of subsequent event.

RIGHTS AND LIABILITIES OF LESSOR AND LESSEE

Contract or Local Usage to the Contrary.—The rights and liabilities of lessor and lessee in Section 108 are in the absence of any contract to the contrary. Lessor and lessee themselves may agree upon their respective rights and duties. If the parties have agreed to be governed by their own terms and conditions regarding their mutual relationship during the subsistence of lease, the respective rights and duties of lessor and lessee are determined by that contract. Any inconsistent provision of Section 108 then does not apply. This section applies only in the absence of a contract to the contrary. Section 108 is subject to also local customs or usage governing the rights and duties of landlord and tenants. So, if any custom in respect of certain rights of lessor or lessee prevails in a particular locality which is against any provision of Section 108, such provision of this section shall not apply.

The rights and liabilities of lessor and lessee are, therefore, governed by (i) any contract between the parties (ii) local custom or usage and, (iii) the provisions of Section 108 of this Act. In the absence of any contract to the contrary or local custom, the mutual rights and liabilities of lessor and lessee are given below.

RIGHTS AND LIABILITIES OF LESSOR

Rights of Lessor.—Section 108 does not provide for any specific right of the lessor. But, since rights and duties are correlative, the liabilities of lessee as given in this section would mean identical rights of the lessor.

Liabilities of Lessor.—Liabilities of a lessor as laid down in Section 108 clauses (a) to (c) are given below :

- (1) Duty to disclose any latent material defect in the property,
 - (2) Duty to give possession to the lessee at his request, and
 - (3) Duty for a covenant for quiet enjoyment of property by lessee.
- (1) **Duty to disclose latent material defect.**—Lessor must disclose latent material defect in the property to the lessee. Defect in the property is latent if it is not apparently visible but the lessor has knowledge of it. Such defect is material if it is of substantial nature. It must be of such nature that if lessee would have known it, he would either have not accepted the lease or would have taken it on different terms and conditions. The lessor is bound to inform only latent material defect in the property which may affect the intended use or enjoyment of the property by lessee. There is no duty to disclose any patent i.e. apparent defect or defect of such nature which does not affect lessee's right of enjoyment. Defective title is not any material defect because it does not affect the possession and use of property by the lessee. Therefore, lessor has no duty to disclose defect in title, e.g., disputed ownership of the leased property. But, if the furniture of the tenant of a thatched house is destroyed by fire caused by a defect in the chimney not disclosed to the tenant, the landlord would be held liable for the loss incurred by the tenant.⁷⁸
- (2) **Duty to give possession.**—Lease is transfer of the right to enjoy or use an immovable property. Without possession, enjoyment of property is not possible. Lessor is, therefore, liable to deliver the possession of property to lessee so that he may use or enjoy it. On the request of lessee, the lessor must deliver the possession to lessee in any manner in which lessee becomes capable of using the property. Delivery of possession may be actual or constructive, as may be possible under the circumstances.

Where a lessor fails to put the lessee in possession of property, the lessee can sue the lessor for obtaining possession. He may sue also for the rent already paid and also claim damages from the lessor. Where the lessee could get possession of only a part of the property he may repudiate the whole lease. But, if the lessee wants to remain in possession of only a part of the whole property, he must pay a reasonable amount of rent. Where the property is in possession of a third person, the lessee is entitled to file a suit against such third person for getting possession.

(3) **Covenant for quiet enjoyment.**—Lease being transfer of the right of enjoyment in an immovable property, it is implied duty of lessor to ensure the lessee a peaceful enjoyment of this right. Accordingly, the lessor is deemed to have contracted that during the term of lease if lessee continues to pay the rent, he is entitled to possess the property without any interference. 'Quiet enjoyment' means 'no interference or objection' in the lessee's possession of

⁷⁸ *Radhika Krishna v. O Fairley*, 3 Bom. L.R. (A.C.) 277. Cited in Mitra's TRANSFER OF PROPERTY ACT, Ed. XIII, p. 917.

immovable property during the period of lease. Lessor's duty to covenant for quiet enjoyment by lessee is indirectly connected with this duty to covenant for perfect title in the property. If lessor's title is defective or disputed, there is likelihood of interference by other claimants of property. Where the lessor has no title to the land and a third person does not allow the lessee to possess or continue possession of the leased property, there is breach of lessor's duty to the implied covenant for quiet enjoyment.⁷⁹ The lessee is therefore entitled to get back the premium paid to lessor. If the landlord keeps his logs of wood in a room leased to the tenant, it is breach of duty by landlord because tenant cannot have quiet enjoyment of the premises. There is breach of this duty also when the lessor does mining work beneath the land leased to the tenant who is put to inconvenience due to such mining work.

Implied covenant for quiet enjoyment of property protects the lessee from any disturbance only from lessor or any person claiming under him. It does not protect the lessee against wrongful acts of a trespasser. Therefore, where the interference is made by any trespasser, the lessee shall take action not against lessor but against such trespasser. The second paragraph of Section 108 (c) provides that implied covenant for quiet enjoyment by lessee is deemed to be annexed to the leased property. Therefore, if lessee assigns his interest, e.g., by sub-letting the property, such covenant for quiet enjoyment shall pass on to the transferee. The result is, the transferee (sub-lessee) too would be entitled to the same protection which law provides to lessee. For example, A lets out his land to B for a term of one year. B assigns his right of enjoyment of land to C. During the period of one year, C too is entitled to have quiet enjoyment of property as B has against A.

RIGHTS AND LIABILITIES OF LESSEE

Rights of Lessee.—In the absence of any contract or local usage to the contrary, the rights of a lessee as given under Section 108 clauses (d) to (f) are given below:

- (1) Right to enjoy the accretions to the leased property.
- (2) Right to avoid the lease in case of any destruction of property by fire, tempest, flood, violence of an army or of mob or other irresistible force.
- (3) Right to repair the property when lessor fails to do so and to deduct the cost of repairs from rent.
- (4) Right to make such payments which are obligatory on the lessor and to deduct that amount from the rent.
- (5) Right to remove the fixtures made by him during tenancy.
- (6) Right to have the benefit of crops growing on the land sown or planted by him.
- (7) Right to assign his interest in the leased property, i.e., right to sub-let the property.

(1) Right to Accretions.—Accretions means additions made to the property either by human being or by operation of natural forces. If during the continuance of lease some accretion is made to the property, it is presumed to be a part of the property. Where the accretions are made by operation of natural

forces, e.g., accretions by alluvion, the lessee can enjoy it during the subsistence of the lease. Thus, where some land is added to the leased property by change of the course of a river, the lessee has right to sue and enjoy the increased area of land together with the main property. Where the lessee himself makes an encroachment on adjoining land and thereby includes it in the leased property, although he may enjoy it during the lease but he must be presumed to have made them for the benefit of his lessor. If the lessee acquires also a title by an adverse possession over the adjoining land, he must be deemed to have acquired for his landlord. The lessee is bound to surrender such accretions to the lessor on the expiry of the lease; he cannot keep it for his own benefit. But lessor himself has no right to get the accretions separated from the main property during continuance of the lease. However, the lessor may demand some additional rent for the additional property added to the original grant (main property).

(2) Right to avoid lease on Destruction of Property.—Where the property is rendered substantially and permanently unfit for use due to fire, flood, violence, mob or other uncontrollable reasons, the lessee has a right to get the lease terminated before expiry to the term. The very object of lease is to confer the right of use and enjoyment of an immovable property to the lessee. Therefore, if it becomes impossible due to injury caused to property which makes it unfit for its use, the lessee must be given the right to avoid the lease. Whether the destruction is permanent and substantial so as to make it unfit for use by the tenant or not, is a matter of fact. The main point is that tenanted property cannot be used for the purpose for which the lease was made. Where the property destroyed by earthquake or cyclone could be made fit for use by repairs, the lessee has no right to avoid the lease. Lessee cannot avoid the lease also where the property is destroyed by his own wrongful or negligent act. When the parties have agreed that tenant shall continue to pay the rent even in contingencies (e.g., fire, flood etc.) given in this clause, the tenant cannot avoid the lease. Where a site was part of the building leased out and such building was totally destroyed, the *Kerala High Court*⁸⁰ held that relationship of landlord and tenant nevertheless existed and the lease was not avoidable under Section 108 (e) of this Act. However, the Court observed that in such a situation, the tenant would not be entitled to build structure without the consent of the landlord. Destruction of the house or building constructed on leasehold property does not by itself determine the tenancy right of the occupant.^{80a}

The right given under this clause is, however, optional; unless the lessee exercises this right by giving notice to lessor, the lease is not terminated.

(3) Right to deduct Cost of Repairs.—Under this Act the lessor has no obligation to repair the property. But, under an express agreement, the lessor may undertake the obligation of making necessary repairs in the tenanted law (e.g. Rent Control Acts) or custom. Where the lessor fails to repair the

⁷⁹ *Vinayakar Rao v. Bhoondli*, AIR 1942 Nag. 103.

⁸⁰ *V. Karipandan Amma v. Multhuruma Iyer Multharisham*, AIR 1995 Ker. 99.
^{80a} *Shahin Rafiqul Khatun & Sons v. Proprietor Kumbhar Sons Hotel P. Ltd.*, AIR 2014 SC 2895.

tenanted property despite express covenant or in violation of local law or custom, the lessee has right to repair the property and deduct its cost from the rents. Lessee has right to deduct the cost of repair only if lessor is bound to repair the property under an express covenant or local law or custom.

The lessor's obligation to repair the premises overrides lessee's right for quiet enjoyment. Lessor is, therefore, entitled to enter into the premises for doing necessary repairs. The lessor is liable for any injury or loss due to breach of his duty to repair. He cannot take plea that he could not repair due to tenant's possession. Where electric wiring and its maintenance were the responsibility of lessor and a visitor died to electric shock because of defective wiring, the lessor alone was held liable.⁸¹

(4) Right to deduct Outgoings.—It is the duty of lessor to pay the outgoings e.g. municipal taxes revenue and other public charges. But, since the lessee is interested in holding the possession of property, he is entitled to pay such public charges to avoid its sale in default of payment of these public charges. Where a lessee makes payment of the public charge in respect of tenanted property, he has right to deduct the amount from the rents.

(5) Right to remove Fixtures.—After termination of lease, the lessee has right to remove the 'fixtures' made by him during continuance of the lease. 'Fixtures' means all the things fixed or attached to earth by him in the tenanted premises and includes trees, buildings and machinery. The lessee can remove and take out these fixtures even after the determination of the lease. He cannot be prevented to enter into the premises and remove them on the ground that now he has no right to enter into the land. However, he must remove the things without disturbing the state of land or the premises.

(6) Right to remove Crops.—After termination of lease, the lessee is entitled to remove the crops sown by him during subsistence of the lease. For removing and collecting all the crops growing on the land, the lessee or his representatives are entitled to enter into the property after determination of the lease. This right is exercisable where the leases are of uncertain duration, e.g., leases from year to year. In other class of leases, the parties themselves may stipulate in respect of removal of crops.

(7) Right to assign his Interest.—In the absence of any contract to the contrary, a lessee has right to assign or transfer his right of enjoyment in the property. Right of enjoyment of an immovable property is a 'property' owned by lessee. He can transfer it to any other person provided there is no prohibition imposed by lessor. Where the lessee of a Government property transferred by sale his rights in violation of terms of the lease deed, the vendee could not seek the remedy of specific performance of such agreement of sale.^{81a} However, a lessee's right to assign his demise (right to use the land) cannot extend beyond the term of his own lease. Where a lessee transfers the leased property to a third person, it is a sub-lease. The lessee is entitled to transfer his interest also

81. *Vilimbei Anand v. Radha Krishna*, A.I.R. 1986 Mad. 173.

81a. *Jagadeeswari Patra v. Shyama Kantia Mohanty*, AIR 2014 Or. 162.

by way of mortgage. The transferee of the lessee too gets the same interest which the original lessee had. The transfer by the liquidator by way of assignment of the company's lease hold rights for consideration so as to enable him to pay the company debts was held to be proper.⁸² But, the original lessee continues to be subject to liabilities attached to the lease. He cannot take the plea that he has transferred the lease-hold. However, where a tenant has non-transferable tenure or an estate in which there is default in payment of revenue or where the estate is in the management of Courts of Wards, the lessee cannot transfer his interest.

Liabilities of Lessee.—Section 108 clauses (k) to (q) lays down the liabilities of lessee. The duties or liabilities of a lessee are given below :

- (1) Duty to disclose facts materially increasing the value of property.
- (2) Duty to pay rent or consideration of lease.
- (3) Duty to maintain the property.
- (4) Duty to give notice to lessor of any encroachment on property.
- (5) Duty to use or enjoy the property in a reasonable way.
- (6) Duty not to erect permanent structure without lessor's consent.
- (7) Duty to re-transfer the possession on determination of lease.

(1) Duty to disclose Facts.—Just as lessor has duty to disclose a latent material defect to lessee, the lessee too is bound to disclose to the lessor any fact known to him which increases the value of property. Thus, in the tenanted land if lessee finds that there is a gold mine, the lessee must inform this fact to lessor because it materially increases the value of property. But breach of this duty by lessee does not amount to fraud and lessor cannot terminate the lease upon such failure. However, the lessor may sue the lessee for damages.

(2) Duty to Pay Rent.—The lessee is bound to pay the rent or premium as stipulated in the lease-deed. It is obligatory on the tenant to pay or tender the rent at proper time and place. But, the tenant's liability to pay rent begins from the date on which he takes possession and not from the date on which the landlord signs the deed. Where the lessee could not get possession of any part of the leased property, he is entitled to claim reduction of rent in proportion of the property not in his possession. Where the lessor has no title at all in the property which he has leased, and consequently the lessee has to vacate the possession, the lessee has no liability to pay any rent.

Where the property is leased to more than one lessee jointly, rent paid by any one is sufficient. Similarly, where the property leased is a joint property, rent paid to one lessor is deemed to be a valid payment of rent to all the lessors.

If the lessee fails to pay the rent as stipulated in the deed, the lessor has two remedies against the lessee, firstly, he may sue the lessee for arrears of rents with interest. Secondly, the lessor may start proceedings for ejectment on the ground of non-payment of rent after giving proper notice.

82. *Aslak Kumar Krishniah Paid v. Continental Textile Mills Ltd.*, AIR 2013 Del. 166.

(3) *Duty to maintain Property.*—The lessee is bound to keep and maintain the property in the same condition in which it was given to him. He has, therefore, to take reasonable care in keeping the property in good condition. The degree of care expected from him is whether he has kept the property in the same condition in which it was given to him? This duty involves repairs to the property which becomes necessary due to his use or enjoyment. The lessee is not liable for any change in the property which is not the result of his use of property. Thus, he has no duty to repair the property damaged in cyclone or earthquake or irresistible forces. Incidental to this duty, the lessee is bound to allow the lessor to enter into the premises for inspecting that the property is kept in good condition.

(4) *Duty to give notice of Encroachment.*—If the lessee comes to know that an encroachment has been made on the property in his possession, it is his duty to inform the lessor so that he may take proper action. Where a lessee becomes aware of any encroachment or interference or of any suit or proceeding in respect of the leased property, the lessee is bound to give notice of this fact to lessor so that lessor may protect his interest.

(5) *Duty to use property Reasonably.*—The lessee has a duty to use and enjoy the tenanted property as a person of ordinary prudence would use his own property. This clause lays down the ordinary rights of a lessee in the absence of any special agreement regarding use of the property. This right, therefore, means no more than that a tenant must use the property in good tenant-like manner. Reasonable use of property means that lessee must not do following acts : (i) He must not use or allow others to use the property for purpose other than for which it was leased to him. (ii) He must not cut down the trees or timber on the land and sell it. (iii) He must not pull down or damage the lessor's buildings. (iv) He must not work mines or quarries on the land leased to him if such work was not started at the time when the land was given to him. (v) He must not do any such act which is destructive or permanently injurious thereto, e.g., he must not commit any act of waste.

It may be noted that reasonable use of tenanted property does not prevent a lessee to do repairs which are necessary for maintaining the property. But such repairs must not be material alteration in the property. However, the tenant is entitled to make minor alterations or adjustments in the demised (leased) premises to make them suitable to his requirements without damaging or impairing the premises.⁸⁴

(6) *Duty not to erect Permanent Structure.*—The lessee cannot erect any permanent structure on the leased property without the consent of lessor. Whether the construction made by lessee is permanent or not depends on the

83. *Shakti Commercial Premises Society Ltd. v. State of Maharashtra*, A.I.R. 2012 NOC 379 Bom. The lessee wanted to shift the use of land from commercial to Information Technology. The lessor did not permit. The High Court did not interfere under writ jurisdiction.

84. *Ramul Singh v. Kunalji Stores*, A.I.R. 1966 Delhi 226; *Bharat Binodan Das v. State of Bihar*, A.I.R. 2008 Pat 29, the tenant demolished construction without landlord's consent. His existence on the leased premises became reduced to that of a mere trespasser, the legal relationship came to an end. The tenant was liable to reconstruct or pay compensation.

nature of construction and intention of the lessee. This is a question of fact. In the words of the Supreme Court a permanent structure means a structure lasting up to the end of tenancy. It need not be ever lasting or a structure creating additional usable space. There are other considerations also for determining the nature of the structure. In this case there was replacement of tin roof by concrete slab and construction of passage. Both alterations were intended to last till subsistence of tenancy. They could not be removed without damage to the other structure. The tenant was held as liable to be evicted.⁸⁵ If a lessee makes permanent constructions without lessor's consent, he is entitled to remove them without causing damage to the tenanted property. If the permanent structures on the leased property are not removed by lessee, then on expiry of the lease they belong to the landlord.⁸⁶ A lessor has right to get also a permanent injunction restraining the lessee from raising permanent structure without his consent. In agricultural leases, the lessee can erect structures for agricultural purposes without taking consent of the landlord. However, the prohibition under this clause does not apply when parties have contracted that the land is being leased for erection of a dwelling house or a shop thereon.

(7) *Duty to Restore Possession.*—Lease is a transfer of right of enjoyment (possession) in immovable property to lessee for specified period and during the subsistence of the lease. Accordingly, upon the expiry of the term or determination of lease before its expiry the lessee must re-transfer the possession to the lessor. It is the duty of the lessee to vacate the possession and restore it to the lessor after expiry of the term. If the lessee (tenant) continues the possession after expiry of the term, his occupation is unauthorized possession. Where the tenant did not vacate the tenanted premises after notice of termination of tenancy by efflux of time (expiry of term), the *Delhi High Court*⁸⁷ held that lessee (tenant) was liable to pay damages and also *mesne profits* to lessor. The court observed that damages can be awarded at market-rate for use and occupation of property after tenancy coming to an end, but such damages should not be penal and unconscionable. If the property is in possession of a sub-lessee and lessee fails to eject sub-lessee, the landlord may file a suit directly against sub-lessee and recover damages from the lessee including the cost of the suit. Where the landlord refuses to take back the possession after determination of the lease, he cannot claim rent from the tenant after that date.

Notice of subsequent event.—An eviction suit was decreed on the ground of reasonable requirement of the landlord and his wife. It was his specific case that he required the property because he and his wife were staying as a licensee in his brother's house. The decree of eviction was granted. An appeal was filed against it. During pendency of the appeal both the plaintiff and his wife died. It was held that the appellate Court could take note of a subsequent event provided that it had relationship with the original

85. *Purnashilam Das Bangur v. Durgamdas Gupta*, A.I.R. 2013 SC 465.

86. *Pundir Keshava v. Chanda Singh*, A.I.R. 1967 Cal. 538.

87. *P.S. Badi v. Project & Equipment Corp. of India*, A.I.R. 1994 Del. 255.

claim of requirement made in the plaint. The plaintiff had restricted his requirement in the plaints to himself and his wife, and not to any other person, not even his own son or grandson. The grandson could get the benefit of the decree on some other ground than that of reasonable requirement.⁸⁸

109. Rights of lessor's transferee.—If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities to the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him;

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Section 109 deals with rights of lessor's transferee. When a person makes lease of his immovable property, he transfers only right of enjoyment to lessee for specified period. Remaining interests of that property continue to remain with him (lessor). So, the lessor is competent to transfer this remaining interest to any third person. This 'remaining interest' of lessor is called his *reversion*. Where a lessor transfers his interest (reversion) the transferee too becomes entitled to all the rights and liabilities of lessor which he had at the time of such transfer. Since the lessor's 'reversion' in the leased property is owned by him, he need not take consent of lessee before transferring his interest in the property. Law laid down in this section is, however, subject to any contract to the contrary.

After the transfer, the transferee has right to directly demand rent from lessee and if he does not pay, sue him for recovery of the rents due after the date of transfer. Thus, the usufructuary mortgagee from lessor gets all legal rights which the lessor had against lessee. He is entitled to received rents and profits from the lessee.⁸⁹ Even where the lessor transfers only a part of the reversion (or part of the leased property) the transferee gets all the rights of lessor in respect of the part of interest transferred to him. In such cases, the lessor, lessee

and the transferee may determine as to what would be the proportion of the rent or premium payable to each in respect of such part. If they disagree, respective shares of each, is made by the Court having jurisdiction to entertain suit for possession of the leased property.

Where the lessee having no reason to believe that lessor has transferred his interest to a third person continues to pay the rents to lessor (who accepts it), the lessee shall not be liable to pay arrears of rents to the transferee. Similarly, the transferee cannot claim rents from the lessee due before the date of transfer. Where a lessor had released (assigned or transferred) all his right, title and interest in the lease-property in favour of a co-owner of the said property, the Supreme Court⁹⁰ held that the transferee (co-owner) was not entitled to arrears of rents due before the date of transfer (release).

Lease does not affect the title of owner of the property. No restriction on owner's right to transfer the property is permissible. The owner's right to resume possession and to terminate lease both can co-exist.⁹¹

110. Exclusion of day on which term commences.—Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration of lease for a year.—Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to determine lease.—Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Date of commencement of Lease

Term or duration is essential element of every lease. Whether this term is longer period or shorter, it is specified in the contract of lease. This section provides rules for counting the period of lease.

Where a lease is said to begin from a particular day (or date), in computing the exact period of duration of lease that day (or date) is excluded.⁹² For example, where a tenancy for a term of four years is expressed to commence from 1st June, 1980, it must be deemed to have commenced on the 2nd June, 1980 and ended on the midnight of 1st June, 1984. Where the date of commencement of lease is not expressed, it is deemed to begin from the date of making of the

90. *N.M. Engineer v. Narpat Singh Virdi*, A.I.R. 1995 S.C. 448; *Bhassu Chandra Harish v. Pooran Chandra Joshi*, A.I.R. 2008 NOC 2447 (Utr), tenants paid rents to the transferee landlords, they were not allowed to deny the title of the new landlord.

91. *Tata Steel Ltd. v. State of Jharkhand*, A.I.R. 2013 Jha 24.

92. Section 9 (a) of the General Clauses Act also provides that wherever the word 'from' is used the first in a series of days should be excluded.

88. *Raj Kumar Datta v. Bimal Kumar Dhar*, A.I.R. 2008 Cal. 190 (DB).

89. *Narpatchand A. Bhambhani v. Shanti Lal Modistanhar Jani*, A.I.R. 1993 S.C. 1712.

lease. In the absence of an express agreement to the contrary, a lease for one year or for a number of years shall last during the whole anniversary of the day of its commencement. The first day from which the year is said to commence is excluded and thereafter the lease continues upto the midnight of the anniversary of that day. In this manner, the lease exists exactly for 365 days as is intended in the lease of one year.

Last paragraph of this section provides that where the lease is made to terminate before expiry of the term at the option of any party, but does not specify at whose option it is to terminate then the lessee not the lessor has such option. However, this rule applies only when the language of the lease is doubtful or the deed is silent about the option.

This section has no application where the lease-deed specifically mentions that the duration of lease is to commence from the date on which lessee obtains possession and it is uncertain as to when lessor would be capable of delivering possession to lessee.⁹³

111. Determination of lease.—A lease of immovable property determines—

- (a) by efflux of the time limited thereby;
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;
- (d) in case the interests of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right;
- (e) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;
- (f) by implied surrender;
- (g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;

93. *H.V. Rajan v. C.N. Gopal*, A.I.R. 1975 S.C. 261.

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration of clause (f)

A lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

SYNOPSIS

- By lapse of time.
- By happening of specified event.
- By termination of lessor's interest.
- By merger.
- By express surrender.
- By implied surrender.
- By forfeiture.
- Breach of express condition.
- Denial of landlord's title.
- Insolvency of lessee.
- By expiry of notice to quit.

DETERMINATION OF LEASES

Determination of lease means termination or end of the contract of lease. After determination of lease, the legal relation between lessor and lessee comes to an end. Section 111 deals with the various situations in which a lease is determined.⁹⁴ Under this section, a lease may be determined in the following situation :

- (1) By lapse of time.
- (2) By happening of specified event.
- (3) By termination of lessor's interest.
- (4) By merger.
- (5) By express surrender.
- (6) By implied surrender.
- (7) By forfeiture.
- (8) By expiry of notice to quit.

(1) *By lapse of time.*—Lease is transfer of demise for a certain period. After expiry of the period specified in the lease, the lease is automatically determined. However, if there is a stipulation for its renewal, the lease continues even after expiry of the fixed period. When the lease for a fixed term is determined after the lapse of time, it comes to an end automatically and no notice is necessary for determination of lease. A lease with stipulation for renewal continues as long as the conditions for its renewal are being fulfilled.

94. It is to be noted that the provisions of this section have been superseded by certain Rent Control and Eviction enactments for providing greater protection to tenants against eviction.

The period of lease expired. The lessee remained in continued possession under the renewal and extension clause for a further period of 10 years without registering fresh lease deed on payment of enhanced rent. It was held that the lessee could not be treated as a tenant by way of holding over after expiry of the original lease period nor it was a monthly tenancy. The suit for eviction on the expiry of the renewal period by efflux of time was held to be maintainable.⁹⁵

Protection against eviction is available to the tenant during the period covered by the lease. The lease period had expired in this case. It was held that the tenant was no longer at liberty to cite the protection clause in lease to resist the termination. The fact that the lessor assented to holding over by the tenant was irrelevant. Such a clause could not be cited by the tenant to set up a tenancy in perpetuity. The clause which contained the tenant's promise to peaceably yield up possession on expiration or earlier determination of tenancy would recognise such a construction.⁹⁶

(2) *By happening of specified event.*—The term of a lease may be made subject to certain condition such as happening of some specified event. If the term is limited conditionally on the happening of a future event, the lease determines upon the happening of that event. For instance, where a lease is made for a term of thirty years or upon the death of lessee whichever is earlier, the lease shall come to an end if lessee dies before expiry of thirty years. A lease for the life of tenant determines upon the death of the tenant. A lease for the period of war comes to an end upon declaration of peace.

(3) *Termination of lessor's interest.*—Where the lessor's own interest in immovable property is limited, the lease comes to an end upon the termination of lessor's interest. Thus, where a lessee sub-lets the property, the sub-lease comes to an end upon the death of lessee. Where a person is given an authority to make lease, the lease made by him determines when that authority is taken away. A lease made by mortgagee in possession determines upon the redemption of the mortgage. But, where a lease from year to year was granted by the Manager of a Temple in the course of management, the Supreme Court held that the lease does not come to an end with the expiry of the office of manager or his successor.⁹⁷

(4) *By Merger.*—Merger means meeting of one interest with another interest. When a limited interest becomes absolute interest, there is merger because smaller interest merges with larger interest. During tenancy, a tenant has only a limited interest namely, 'right to enjoy the property (house)'. If the landlord makes gift of or, sells the tenanted house to the tenant, the tenant does not remain a tenant; he becomes owner of the house. The tenancy is, therefore, determined by merger of reversioner with tenants mere right of enjoyment. Section 111 (d) incorporates the principle of the maxim, *Nemo potest esse tenens et dominus*. This means "nobody can be both, land-lord and tenant of the same property". Where the interest of co-owners is acquired by lessee before expiry of the term, the lease is determined and lessee becomes owner of the premises. So, if the owner was entitled to apply for a cinema licence, the lessee after acquiring the interest of co-owner, shall also be entitled to apply for that

licence.⁹⁸ For merger, it is necessary that there is union of two unequal interests at the same time in the same person. If the two interests are equal and co-exist simultaneously, there is no merger. There is no merger if lessee of a holding takes a usufructuary mortgage of the holding from the lessor. In this situation, the lessee who has already a legal right of possession shall become usufructuary mortgagee who too is entitled only to possess the same property. There would be no change in his 'interest' of the specified immovable property. Thus, there is no merger. Moreover, where a lessee purchases only a part of reversion, the lease is not determined.

The merger of the interest of a lessee with that of the mortgagee could not be automatic. The Supreme Court observed that it would depend upon the facts and circumstances of each case and the terms of the document and that therefore no hard and fast rule could be laid down.⁹⁹ Where a tenancy was inherited by the legal representatives of the original tenant and only one of them purchased one portion of the property, it was held that there was no extinguishment of the tenancy by the merger.¹

One of the joint tenants purchased the premises which was under their lease. The other joint owner neither claimed any tenancy rights, nor paid rent to the purchaser. It was held that the joint tenancy became merged into the right of ownership. Legal heirs or relatives of the joint tenant could not claim any tenancy rights in the premises.²

(5) *By express surrender.*—Surrender is opposite of merger. In a merger, a larger interest is merged with smaller interest whereas in surrender the smaller interest unites with larger one. But, in both, the lease is determined because two interests unite. Thus, where a lessee vacates the premises before expiry of the term, lessee's smaller interest (right to enjoy property) reverts back to lessor's reversion (larger interest). Surrender is yielding up the lessee's interest in lease and putting an end to the contract of lease. However, mere relinquishment of 'right to enjoy' is not sufficient; it must be followed by delivery of possession. Surrender without delivery of possession is ineffectual. Surrender may be express or implied. In the express surrender, the lessee expresses his intention to relinquish his interest in the lease-hold to which lessor agrees and this is followed by delivery of possession. An express surrender becomes effective at once and the lease is determined immediately.

Whether a surrender is express or implied, beir g essentially a question of fact, must be specifically pleaded in the plaint.³

98. *Krishna Kishore Etm v. Govt. of A.P.*, AIR 1990 SC 2292; *Pramod Kumar Jaiswal v. Biji Husai Bano*, AIR 2005 SC 2857 [But, acquisition of rights of some co-owner landlord by the lessee does not amount to merger under Section 111(d) because there is no extinguishment of the tenancy as such.]

99. *Chandrabhat Nambiar Rao Manohar v. Parthabai Bhairav Mohite*, (2008) 6 SCC 745.

1. *Honzeada Begum v. Champa Bai Jain*, AIR 2009 NOC 2623 (MP) (DB), the purchaser tenant and other tenants continued to be tenants; they could be evicted in accordance with the M.P. Act.

2. *Thirty Sam Shivaji v. Maheshwari Vaidi*, AIR 2010 Bom 170 (DB).

3. *Amar Nath Prasad v. Sanjay Das Gupta*, AIR 2008 NOC 1171 (Cal) (DB). The case was under Section 13 (6) of the West Bengal Premises Tenancy Act, 1997, and it was held that the notice upon one of them only is sufficient. Notice addressed to only one of the tenants-in-common is not a valid notice to quit. The provision as to notice being based on public policy cannot be waived because the suit has been continuing for years.

95. *Ramula Seal v. Sahini Day*, AIR 2008 CA 75 (DB).

96. *EIC Holdings Ltd. v. Calcutta Dock Labour Board*, AIR 2008 NOC 1463 (Cal).

97. *Aygun Verraju v. Preeti Venkatesh*, AIR 1966 SC 629.

(b) *By implied surrender.*—Surrender is implied if it takes place by operation of law. By operation of law, there is surrender (i) by creation of a new lease or, (ii) by relinquishment of possession. When a lease accipit from the lessor a new lease of the same property which is already leased to him, there is implied surrender of the earlier lease. The former lease is thereby impliedly surrendered. When a lessee accepts an office inconsistent with lease, there is implied surrender. For example, where lessee accepts the lease by remaining in possession as a servant of lessor there is implied surrender because any surrender if the former and the new leases are in respect of different rights in the immovable property. Thus, where the former is a mining lease and the subsequent one is for coffee plantation above the same land, both the leases may co-exist and there cannot be implied surrender to vary the rent stipulated in a registered lease for a term and there was no intention to create a new lease. It was held that there is no implied surrender of the earlier lease.⁴ In *T.K. Lathika v. Seth Karsandas Jambadas*,⁵ the tenanted premises was gifted by father (original landlord) to his daughter (new landlord). Daughter, without waiting for expiry of the moratorium period of one year from the date of gift, filed an eviction petition. She claimed that right to ask for possession was based not on gift-deed but on basis of fresh lease agreement between daughter (new landlord) and the erstwhile tenant with enhanced rent. The Supreme Court held that in this case there was no implied surrender. The Court observed that when only two differences could be noticed as between old and new lease agreement (former lessor was father and former rent was lesser in amount), an implied surrender of lease could not be inferred from it. However, in *P.M.C. Kurthimani Nair v. C.R. Nagarathia Iyer*,⁶ the lessee of a land which included buildings, started a mill. Thereafter, the lessee assigned the leased land. The assignment deed provided that the assignee would not object to payment of rent by assignee. The assignee of the mill entered into a fresh lease of higher rental value. The Supreme Court held that this assignment amounted to an implied surrender of the lease-hold rights of the lessee in favour of assignee of the mill.

For implied surrender, delivery of possession by the lessee is necessary. The possession must be left by lessee and accepted by the lessor. The delivery of possession may either be actual or constructive. For example, there is some dispute between a landlord and the tenant. The tenant then hands over the keys of the house to landlord who takes it. This is implied surrender and the tenancy is determined.

In the case of relinquishment of possession, although technically a tenant may continue to occupy the premises, once the nature of possession changes resulting in a change in his status with his acceptance, it may amount to a virtually taking over of possession. But this is not a *sine qua non* of an implied

4. *D.S. Commercial Private Ltd v. S.S. Jain Sabha* (1984) Cal 194.

5. AIR 1999 SC 3335; *Manal Lal v. Ravindra Kumar*, AIR 2013 Pat 137, an implied surrender does not necessarily result from acceptance of new tenancy. The Court has to consider the effect in the light of uncontroverted facts.

6. AIR 1983 SC 307.

surrender because such surrender is also possible through change of relationship.⁷

(7) *By forfeiture.*—Forfeiture is another mode of determination of leases. Forfeiture of a lease means loss of lessee's right to use the property by some fault on his part. A lease is determined by forfeiture on following grounds :

- (a) Breach of express condition by lessee.
- (b) Denial of landlord's title.
- (c) Insolvency of the lessee.

(a) *Breach of express condition.*—When the lessor imposes upon the lessee any express condition and lessee fails to perform that condition, there is breach of condition by lessee. The lessee's right under the lease is lost upon breach of such condition. For determination of lease by forfeiture two elements are necessary : (i) express condition laid down by lessor and (ii) the lessor's right to resume possession upon breach of condition. The condition must be expressly stated so as to become part of the stipulation between the parties. It must be laid down in definite terms that lessee must do or abstain from doing a thing during the lease. In *Regluram Rao v. Eric P. Mathias*,⁸ Supreme Court observed that Section 111 (g) itself requires that for the forfeiture of lease, the lessee should commit breach of an express condition which must provide that on breach thereof, the lessor may re-enter. The words 'express condition' itself stipulates that condition must be clear, manifest, explicit, unambiguous and there is no question of drawing any inference. Further, while explaining the law regarding termination of leases by forfeiture, the Apex Court held that a condition reserving lessee from alienating leasehold property is not illegal or void and that in this regard no distinction has been made between perpetual and temporary lease. But such condition alone is not sufficient. There must also be provision that on breach of condition, the lessor is entitled to re-entry, i.e., determination of lease by forfeiture. In the absence of right of re-entry, i.e., determination of lease by forfeiture. Express condition in the lease may be of regarding payment of rent on specific date or for not alienating the property or for using the property only in a particular way etc.

Where non-payment of rent by lessee was a breach of an express condition of the lease but there being no forfeiture clause in the agreement as regards non-payment of rent, it was held that the lessor did not have the right to re-enter premises in the absence of a forfeiture clause. The lessee was not liable to be evicted. He was only liable to pay arrears of rent along with costs and interest.⁹

(b) *Denial of landlord's title.*—Lessee has only a limited right in respect of the tenanted property, he is not owner. When the lessee claims to be owner of the tenanted property he denies the status of landlord. But, by so doing he also denies his own status of tenant. Denial or disclaimer of lessor forfeits tenant's

7. *Tenaland v. Sagubhai*, AIR 2007 SC 2059; *B. Parameshtianth v. M.K. Shankar Prasad*, AIR 2009 Kar

88, tenant agreed to buy the property, to be responsible for and not to pay rent from the date of agreement, held, implied surrender.

8. AIR 2002 SC 797.

9. *Elanathi Sietty v. E. Ramananthappa*, AIR 2013 Kar 165.

right to enjoy the property and the lease is determined. Denial of lessor's title necessarily means that lessee asserts either himself to be the owner or regards another person as owner of the leased property. In *Palani Ammal v. Viswanatha Chettiar*,¹⁰ the Supreme Court held that a tenant incurring for forfeiture of tenancy by denying title of landlord is not entitled to protection under Madras City Tenants Protection Act, 1922. In order to make a disclaimer sufficient, it must be a direct repudiation of the relation of the landlord and tenant. Such disclaimer may be verbal or written. But, disclaimer or repudiation by lessee must be clearly made in the express words and prior to the notice to quit. In *Guru Amarjit Singh v. Kathan Chaud*,¹¹ the Supreme Court held that disclaimer by denial of landlord's title or setting up title in himself or third party is a ground for forfeiture of lease but, the repudiation must be clear and unequivocal and also anterior (prior) to the issuance of the notice determining lease under Section 111 (g). The Court observed further that such disclaimer may be in the pleading anterior to the suit (for determining the lease) or in any other documents, but directly relatable to the knowledge of lessor. An incidental statement *per se* does not operate as forfeiture.

In a case before the Bombay High Court, involving denial of title, there was sale of property to a lady who thus became the new landlady. But the tenant denied her title before the Rent Controller. He could not obtain any declaration about her ownership. This was not a *bona fide* conduct on the part of the tenant. Determination of lease by forfeiture was held to be proper. The Court also said that Section 111 (g) has an independent operation without being dependent on the rule of estoppel under Section 116 of the Evidence Act. Against this the tenant objected before the Rent Controller that she was not the owner. Subsequently when she filed an eviction suit in a Civil Court, he contended that she must obtain permission of the Rent Controller. The Court said that he was not to be allowed to approbate and reprobate this way. He became bound by estoppel also under Section 116, Evidence Act, 1872.^{11a}

(c) *Insolvency of lessee*.—Insolvency of the lessee by itself does not forfeit the lease. There must be a stipulation between the parties: the lessee's right shall be lost in case of his insolvency and lessor would be entitled to resume possession. Reason behind providing for a condition of forfeiture of lease upon lessee's becoming insolvent is to ensure regular payment of rent by lessee. Lessor cannot demand rent upon lessee becoming insolvent just as any creditor cannot demand personal loan from an insolvent debtor.

In the above-mentioned cases, there is forfeiture but the lease is not determined *ipso facto*. When the lessee commits any lapse on his part, the lessor gets right to forfeit the lease before expiry of the term. But, for determination of lease, written notice by lessor must be given to the lessee.

(8) *By expiry of notice to quit*.—Under Section 106 it is provided that for termination of periodical leases, e.g., leases from year to year or month to month, notice is necessary. Where the term is fixed, no notice is required because

such leases determine by expiry of the term under clause (a) of Section 111. In permanent lease, no question of determination arises. Where notice is necessary to terminate the lease, the lease is determined after expiry of the notice to quit. In year to year leases the notice expires after six months and in month to month leases, the notice expires after fifteen days. A lease was created for one-year period. One of the term was that the lessee would vacate the shop when required by the owner for her personal use. The lessee produced no evidence to show that the lease was intended to be perpetual. The mode of termination as prescribed by Section 111 (h) was properly complied with. The owner was held to have become entitled to the decree of eviction. It was not necessary for her to prove that she reasonably needed the premises for her personal use. The Court also added that acceptance of rent after expiry of the period of lease, without anything more, would not create a perpetual lease.¹²

112. *Waiver of forfeiture*.—A forfeiture under Section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Under Section 111 (g), the lessor has right to determine the lease by forfeiture in the event of breach of a condition or, by denial of lessor's title by lessee or in the event of lessee's insolvency. But, these events merely entitle the lessor to forfeit the lease. It is not necessary that he must exercise this right. He may or may not exercise this right. If the lessor does not exercise this right, he is said to have waived his right to determine the lease despite there being an opportunity for the same. If the lessor chooses to enforce this right he gives notice to quit to the lessee. If he chooses to waive or abandon this right, then again he has to do something indicative of his intention. Where an event has happened resulting into forfeiture but knowing that there is an occasion for forfeiture lessor does nothing, waiver may be inferred from his acquiescence. Acceptance of rent after happening of the event for forfeiture is also waiver of forfeiture by the lessor.

113. *Waiver of a notice to quit*.—A notice given under Section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations

- (a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts rent which has become due in respect of the property since the expiration of the notice. The notice is waived;

10. AIR 1998 SC 1309.
11. AIR 1994 SC 227.
11a. *Lalji v. Kalshi Motisram Gupta*, AIR 2014 Bom 143.

12. *Vijay Kumar v. Harbhajan Kaur*, AIR 2013 NOC 2171 & K.

- (b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. This first notice is waived.

SYNOPSIS

- Waiver of notice.
- Dismissal of ejectment suit for default.

Waiver of notice

This section provides for waiver of notice to quit. Lessor is entitled to determine the lease after the expiry of his notice to quit in yearly or month to month lease. But, he is not bound to exercise this right. He may, abandon or waive his right. Where he waives his right the lease is not determined even after the expiry of notice to quit. Such waiver may either be express or implied. Where the lessor accepts the rent after expiry of the notice to quit, the notice is waived. Where after expiry of notice to quit, the lessee continues to remain in possession of the property and lessor gives second notice, the first notice is waived. However, a notice to quit may be waived only by mutual consent. Waive of forfeiture discussed earlier is an unilateral act of the lessor.

Dismissal of ejectment suit for default

The case was under the Delhi Rent Control Act, 1957 (Section 14). The ejectment suit was dismissed for default. The Court said that the effect was not that the tenant had become a tenant in perpetuity, nor did he become the owner of the tenanted premises. At the very best, it operated as a waiver under Section 113 of the TP Act or an assent of the lessee within the meaning of Section 116 of the TP Act. The lessee was not a tenant at sufferance but a tenant from month to month or year to year depending upon the original lease, terminable at any future date as provided under Section 106 of the TP Act. The landlord could file a fresh suit for ejectment.¹³

114. Relief against forfeiture for non-payment of rent.—Where a lease of immovable property has determined by forfeiture or non-payment of rent, and the lessor sues to eject the lessee, if at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

SYNOPSIS

- Relief where forfeiture due to non-payment of rent.
- West Bengal Premises Tenancy Act, 1997.

Relief where forfeiture due to non-payment of rent

Where a forfeiture occurs due to non-payment of rent, the lessor may determine the lease by giving notice. If after giving notice to quit, the lessee

neither vacates the possession nor takes initiative for paying the rents, the only remedy left for the lessor is to file a suit for ejectment against the lessee. Section 114 provides that if at the hearing of suit the lessee pays or tenders to the lessor the arrears of rents together with compensation, the Court may not pass a decree of ejectment against him. Instead of passing a decree of ejectment, the Court may order that lessee may continue possession after making payment of arrears of rent, compensation and the cost of suit. This section, therefore, gives an equitable relief to the lessee. But, before making order in favour of lessee, the Court has to take into account the circumstances of the case and the conduct of the lessee. The lessee cannot get the benefit of this section if instead of making payment of rents or tendering the same in the suit unsuccessfully pleads payment of rent to lessor. Where the tenancy is determined by efflux (expiry) of time, it would be meaningless to relieve the tenant against earlier determination of tenancy by forfeiture for non-payment of rent because equity always looks to the substance and not to the form. Therefore, relief under Section 114 must not be given to tenant.¹⁴ The executing Court cannot go behind decree by invoking Section 114 of the T.P. Act and grant relief against forfeiture.¹⁵

A tenant, in order to seek relief under the section, made a deposit without leave of the Court and that too without filing any petition. The Court said that risk involved in such deposit is to be borne by the tenant. Such deposit cannot be legalised. The tenant was not entitled to relief against forfeiture.^{15a}

Although this section does not apply to agricultural leases, the Court has power to apply the provisions of this section also to such leases on the ground of equity, justice and good-conscience.

A trust executed a sub-lease to a club. The lease was determined for non-payment of rent. The trust filed a suit for possession and recovery of rent. The club admitted sub-lease and default in payment of rent, but disputed the title of the trust to the property, validity of sub-lease and the right to demand rent. The club also filed a suit challenging the title of the trust and cancellation of the sub-lease. But in its application for relief under the section, the club relied upon the lease and the agreement to pay rent to the trust. It was held that the club could not be granted relief under the section but for the fact that it had taken inconsistent pleas about the sub-lease. The club had also adopted dilatory tactics. This disentitled it from claiming any relief by way of writ under Article 136 of the Constitution.¹⁶

West Bengal Premises Tenancy Act, 1997 (Section 6).—The suit was for eviction by enforcing forfeiture. The lease period of 21 years had expired. Prior to the execution of the lease deed, the lessee was a tenant in the premises. During subsistence of the lease deed, the suit for eviction was filed on the ground of forfeiture for non-payment of rent. The lessee paid the arrears of rent and costs and a compromise was arrived at. The compromise resulted in revival

14. *Shyamnath Agrawala v. Nanda Rani Dassi*, AIR 1988 Cal. 133; *National Textile Corp., Ltd. v. Ahmednagar Samasta Moha Chauraneri Vastik Gmtil*, AIR 2008 NOC 841 (Guj), relief against forfeiture granted on payment of entire rent.

15. *Pritishchandra Ramchand Sablok v. S.Y. Shinde*, AIR 1993 SC 1929.

15a. *Chittaranjan Mondal v. Tapen Kumar*, AIR 2015 Cal. 1.

16. *Karam Kaphi v. Lal Chandra Public Charitable Trust*, AIR 2010 SC 2077; *Avin Kumar Kashin Dev v. Kishan Lal Shyam Lal*, AIR 2012 All. 156, no written agreement for lease between the parties. No relief against forfeiture either under Section 111 (g) or Section 114.

13. *M.R. Sohni v. Doris Ramharan*, AIR 2008 Del 110.

of the lease. It was held that the eviction of the lessee on the expiry of the period was proper. He could not take the plea that after the compromise a new tenancy was created and that acting on the lease deed had ceased.¹⁷

114.-A. Relief against forfeiture in certain other cases.—Where a lease of immovable property has determined by forfeiture for breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with possession, or disposing of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

Relief against forfeiture in other cases

This section was introduced in the Act by Amending Act of 1929. It provides relief to lessee against forfeiture in certain other cases, e.g., breach of an express condition with a proviso for re-entry annexed to it. Thus, it applies to forfeiture due to breach of a covenant to repair or breach of any other express condition except those given in second paragraph of this section. Relief to lessee in forfeiture for non-payment of rent has been dealt in Section 114. This section lays down that when a lease is determined by forfeiture for breach of an express condition, the suit for ejectment shall lie only after; (i) notice is given to lessee and (ii) if the breach is capable of being remedied, the lessee fails to remedy it after service of such notice. This section too gives an equitable relief to a lessee whose lease may be determined by forfeiture due to his own fault of breaking an express condition. However, this relief cannot be given to a lessee whose lease has been forfeited for disclaimer. For a relief under this section two conditions are necessary.

- (i) The lessor must give a written notice to lessee that he has committed breach of a specific covenant.
- (ii) The breach is capable of being remedied, e.g., where the lessee does not repair the tenanted premises despite an express covenant, it may be repaired afterwards.

The lessor's suit for ejectment may be decreed by the Court, only when the lessee fails to correct his fault within a reasonable time, after the service of notice.

17. *Anni Kumar Mohindra v. Dr. Bhaskar Sen & Co.*, AIR 2008 NOC 1335 (Cal).

If a breach which results in forfeiture of lease is remediable, an opportunity should be given to the lessee to make use of his remedy before ordering forfeiture.¹⁸

The scope of this section is, however, limited in the sense that it is applicable only where the forfeiture occurs due to breach of an express condition with right of re-entry. The second paragraph makes it clear that this section does apply to the breach of conditions against;

- (a) assignment,
- (b) sub-letting,
- (c) parting with possession, and
- (d) disposing of the leased property.

115. Effect of surrender and forfeiture on under-leases.—The surrender, express or implied, of a lease of immovable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-lease, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under Section 114.

Effect on under leases

Surrender, whether express or implied, is a mode of determination of lease. By surrender, the lessee relinquishes his right to enjoy the property before expiry of the term of lease. But, the lessee (in the absence of any express prohibition by lessor) can himself grant a lease of his leasehold i.e., he can sub-let it. This is called under-lease. Section 115 provides that surrender of lease by lessee does not affect an under-lease which has been granted to sub-lessee on the same terms and conditions (except rent) as the original lease. In effect, this provision safeguards the interest of the under-lessee. By surrender, lessee cannot destroy the rights which he created in favour of sub-lessee. Except where the surrender has been made for obtaining a new lease, the under-lessee is liable to the original lessor and not to his lessor (the lessee). Thus when the lessee surrenders, expressly or impliedly to the lessor, the sub-lessee becomes lessee of the lessor on the terms and conditions of the sub-lease. But, where the surrender has been made for getting a new lease, the sub-lessee continues to be lessee of his sub-lessor (lessee).

18. *Ramesh Prasad v. State of Bihar*, AIR 2008 NOC 1415 (Pat).

The second paragraph of Section 115 enacts the rule that if a lease is forfeited, the under-lessee also loses his estate unless the forfeiture is made by the lessor in collusion with the lessee. Where the forfeiture is a collusive and fraudulent proceeding between lessor and lessee, the interest of under-lessee is not affected. Thus, except where forfeiture is fraudulent, the forfeiture of lease would destroy the right of sub-lessee. The same rule is applicable to other persons who derive interest from the lease.

116. Effect of Holding Over.—If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

Illustrations

- (a) A lets a house to B to for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.
- (b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

SYNOPSIS

- Tenant-at-Sufferance.
- Tenant by Holding Over.
- Effect of Holding Over.
- Agreement to the contrary.
- Rights of tenant by Holding Over.

HOLDING OVER

Tenant-at-Sufferance.—After determination of lease, the lessee has no right to continue possession. Where the lessee continues possession of the property after determination of lease, his possession is illegal. The legal position of such lessee is that he is having a possession without any right. A lessee who continues possession after determination of lease is technically called as *tenant-at-sufferance*. 'Tenant-at-sufferance' is a term used under the common law of England. Although possession of property by a person without any legal right is a trespass but a lessee's possession after determination of lease is not trespass. Tenancy at sufferance is therefore a fiction to avoid continuance in possession amounting to trespass. But, the position of tenant-at-sufferance is no better than that of a trespasser. The landlord can sue him any time without giving any notice to quit. Tenant-at-sufferance is also liable for damages for his illegal possession. A tenancy-at-sufferance arises only by implication of law when a person having lawful possession continues it without owners consent even after the termination of his legal right. Such a tenancy does not arise by contract because the tenant holds possession without consent of the owner of property.

After the determination of a tenancy, the tenant does not become a trespasser. He continues to be a tenant till the decree of eviction is passed against him.¹⁹

Where no written request for renewal was made after expiry of the lease period as per agreement, the Court said that the mere acceptance of rent did not amount to implied renewal. The lessee could not claim the status of "holding over". He was liable to be evicted.²⁰

Tenant by Holding Over.—After determination of lease if the lessee continues to hold possession with the consent of lessor, the lessee is called a *tenant by holding over*. A tenant-at-sufferance continues to hold over the possession after determination of lease without consent of the landlord whereas, a tenant holding over continues such possession with the consent of landlord. After determination of lease, if the lessor gives his express or implied consent for lessee's possession, the lessee is presumed to hold the property under a contract.²⁰ Such possession is deemed to be for the same purpose for which the original lease was granted. Duration of such possession is deemed to be a tenancy-at-will. A tenant by holding over is a tenant-at-will because it arises by implication of law in cases of permissive occupation.

Effect of Holding Over.—Section 116 provides that if a lessee remains in possession after determination of the lease and lessor accepts the rent or otherwise assents to his possession then, in the absence of any contrary agreement the (new) lease is deemed to be year to year or month to month lease. This section contemplates that a tenant holding over continuing the possession amounts to a new tenancy and the terms thereof are the same as those of a tenancy which had expired. So, the new tenancy would be year to year or month to month, as the case may be and is liable to be terminated any time by notice to quit.

For application of this section following two conditions must be fulfilled:

- (1) The tenant must be in possession of the property after determination of lease.
- (2) The lessor or his representative must accept rent or otherwise give his express or implied consent to lessee's possession.²¹

The benefit of Section 116 is given only where the original lease was fixed for year to year or month to month. It does not apply where the original lease was a lease for life of lessee. Representatives or assignees of the tenant-for-life cannot become tenants without the formalities of Section 107.

19. *Kamini Chund v. LRs of Lathi Chund*, AIR 2009 NOC 868 (Baj).

19a. *Punch Raglan Tank Renthins Sarda & Co. v. Hindustan Petroleum Corporation Ltd.*, AIR 2014 CH 178.

20. *C. Albert Morris v. K. Chandrasekaran*, (2006) 1 SCC 228, the landlord filed a suit for ejectment but did not pursue the same and withdrew it with the permission of the court to file a fresh suit on the same cause of action, it was held that that could not amount to an assent on his part to the continued occupation of the tenant.

21. *Mamthabai Kumbhakar v. Kishorji Therasabhai Charammal / Theodhji Umrinolachakty*, AIR 2009 Ker 143, the lessee was induced into possession under an unregistered lease, the rent was accepted by the landlord, the unregistered lease was void, the court said that the lessee was to be regarded as a tenant by holding over.

The consent, express or implied, of the lessor is necessary. Acceptance of rents by the lessor implies his assent for lessee's possession of property after determination of lease. Whether a tenancy has been created by holding over under this section or not, is a question of fact. And, from acceptance of rent from lessee or under-lessee after expiry of lease, it can be fairly inferred that lessor has agreed to the holding over. For instance, A lets a house to B for five years. B under-lets the house to C at a monthly rent of Rs. 100. After expiry of five years, C continues possession of the house and continues to pay rents to A. C's lease is renewed under Section 116. In the illustration (b) of this section the original lease is for the life of a third person. A lease for the life of any person is also a lease for fixed term because death of that person is certain. Thus, where A grants a lease to B for the life of C and B continues possession with A's assent, even after C's death (upon which the lease terminated), B's lease is renewed. If absence of dissent continues for a sufficiently long period, it may give rise to an inference of assent by the landlord.²² Since tenancy created by holding over is a new tenancy and in order to create new tenancy there must be a bilateral act, the assent of lessor is necessary. In *Bhureshwar Prasad v. United Commercial Bank*,²³ a tenancy was created for a period of five years between owner of a premises and the tenant (bank) through a registered deed. Even after the expiry of the term of five years, the tenant-bank continued the possession. However, the tenant also continued to deposit the rent regularly including increased rent, which was being accepted by the owner (landlord) even after the expiry of the term of five years. The owner of the premises filed suit for eviction on the ground of expiry of the term of lease. The Supreme Court held that from the acceptance of increased rent by the landlord, his assent to tenant (bank) continuing in possession after expiry of the lease can easily be inferred. There is, therefore, creation of tenancy from month to month. The Apex Court held further that in this situation, the tenant-bank was entitled to get protection from being evicted on expiry of the stipulated period of lease. A tenant who continues possession without landlord's consent or acquiescence, is not a tenant holding over, but a tenant at sufferance.

A new tenancy is not created under this section if the landlord received rents from tenant who continues possession after expiry of the term and is protected by the Rent Acts. Such tenant becomes a statutory tenant. In these cases while the statutory tenancy continues, acceptance of rent by landlord by itself will not afford ground for holding that he assented to new tenancy. There must be some independent evidence of assent by the landlord.²⁴ Similarly, where the

²² *Ram Bhai Singh v. Trilok Prasad Mishra*, AIR 1957 Cal 173.

²³ AIR 2000 SC 2796. In *Shakti Vats v. Dr. Farima Razi*, AIR 2008 NOC 2442 (Del.), it was held that merely because the agreed rent was tendered by the tenant beyond the period of lease and was accepted by the landlord would not give to the tenant the status of tenant by holding over. The decision also seems to be at variance with the illustration (a) to the section. *C. Albert Morris v. K. Chandrasekaran*, (2006) 1 SCC 228, the landlord required the tenant to vacate the premises and also telling him that any amount paid by the tenant after the expiry of lease would be adjusted against compensation and should not be taken as landlord's consent to continuance of possession, such acceptance of rent was held not to have effect of renewal of the lease or confer on the occupant the status of tenant.

²⁴ *Padmanabhi Pillai v. Santharam Viswantharam*, AIR 1987 Ker. 98.

payment of rent is made at a time when there is no question of lessor assenting to the lessee's continuing in possession and neither party has treated it implying such assent, new tenancy is not created under this section.²⁵

Agreement to the contrary.—The presumption of holding over under this section may be excluded by an agreement to the contrary. But such agreement must be express. An agreement to exclude holding over should not be implied. Such contrary agreement must specify the terms of the holding over as well as duration of the new lease.

Rights of tenant by Holding Over.—A tenant by holding over has the same rights as were available to him before determination of the lease. A tenant by holding over is entitled to sublet the holding. With the assent of the lessor, a tenant by holding over can effect a valid mortgage of the property in his possession even after the expiry of the original lease. He also becomes entitled not to be evicted except by following the due course of law. He was allowed an injunction restraining his eviction and also for relief of restoration of power supply.²⁶ When the term of the original lease expires, the sub-lease effected by the lessee would also come to an end. The sub-lessee would become liable to be evicted. He is not entitled to deny the title of the original lessor or that of the lessee.²⁷

Renewal.—A lease with renewal clause was executed in favour of the lessee by the Municipal Corporation. The lessee assigned the lease to a sub-lessee (appellant) with right to purchase the lessee's rights under the head "lease" including that of renewal. The sub-lessee's suit for specific performance of the covenant for purchase of lessor's rights and to get the lease renewed was dismissed. The Corporation resolved to renew the lease in favour of the lessee. But subsequently the Corporation decided to renew the lease in favour of the sub-lessee because the original lessee had not acted upon the resolution. The sanction of the State Government was not taken for this purpose. This was held to be illegal. The sanction granted by the Government during subsistence of the resolution to grant renewal to the sub-lessee was also held to be illegal.²⁸

A lease deed contained a renewal clause. The lessee did not exercise the right of renewal. The Court found that the lessor continued to accept rent even after expiration of lease by efflux of time but in ignorance and never assented to continuance of lessee's possession. This fact combined with the lessee's disputing the notice to quit was held to be not capable of creating a new term of lease.²⁹

117. Exemption of leases for agricultural purposes.—None of the provisions of this Chapter applies to leases for agricultural purposes, except in so far as the State Government may by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such

²⁵ *Padmanabhi Pillai v. Santharam Viswantharam*, AIR 1987 Ker. 98.

²⁶ *Bibek Mehta v. Pyarimohan and Pramila Trust*, AIR 2012 Or. 87.

²⁷ *Kamini Kapoor v. Punjab National Bank*, AIR 2013 Cal 206.

²⁸ *Sanoji Screens P. Ltd. v. Gitanjali*, AIR 2012 SC 1649.

²⁹ *R. S. Iron Industries P. Ltd. v. Calcutta Pinpoint Society*, AIR 2013 Cal 94.

leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Agricultural Leases Exempted.—The provisions of this Chapter do not apply to leases for agricultural purposes. Where an immovable property is leased for agricultural purposes, the technical rules of this Chapter may create some hardship to peasants who cultivate and harvest the crops subject to climatic conditions and local usages. The object of exempting leases for agricultural purposes is to retain the established local usages and the statutory laws containing special provisions for agricultural holdings.

There are enacted laws for regulating the leases for agricultural purposes in several States of this country. These enactments contain provisions for the duration, execution and other matters relating to agricultural tenancies. They are the local (statutory) laws which have specifically been exempted from the provisions of this Chapter of Transfer of Property Act. Accordingly, if the lease relates to agricultural purposes and there is local statutory law, the provisions of that local statutory law (or agricultural tenancies) may prevail over any inconsistent law given in the Transfer of Property Act. Further, in view of specific mention of the exemption of agricultural leases from the operation of Transfer of Property Act, any provision of this Act cannot be extended to agricultural leases in presence of any local law for such type of leases. In *Thakur Kishan Singh v. Arvind Kumar*,³⁰ the Supreme Court held that if the Tenancy Act of the State (Madhya Pradesh in the instant case) provides for execution of leases which does not contain provision like Section 107 of the T.P. Act (which deals with execution of leases), the principles of Section 107 of the Transfer of Property Act cannot be extended to it.

The words "agricultural purposes" as used in this section must be given strict interpretation. A mere fact that the lease relates to agricultural land does not make it a lease for agricultural purposes and cannot get exemption under this section. The term 'agriculture' means raising of annual periodical grain crops, vegetables, fruits and garden products. A lease for horticultural purposes stands on the same footing as agricultural lease and is exempted from the operation of this chapter. Cultivation of tea plants is an agricultural purpose. Lease of a tank which does not appertain to an agricultural holding but is used only for preservation of fish is not an agricultural lease.³¹

Although the agricultural leases have expressly been exempted yet, in the absence of local usages and local laws, the provisions of Sections 106 to 116 may be applied to them on the ground of equity, justice and good conscience.

VI

OF EXCHANGES

118. "Exchange" defined.—Where two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

SYNOPSIS

- Definition of Exchange.
- Characteristic features of Exchange.
- Transfer of ownership.
- Properties need not be immovable.
- Exchange includes barter.
- Mode of Transfer.
- Punjab.

Exchange is transfer of ownership in a property for consideration of ownership of another property. Transfer of ownership for consideration of money or price is sale. Transfer of ownership without consideration is gift. Transfer of ownership for consideration of ownership of another property is exchange. Exchange is, therefore, a transfer where a property is 'changed' with another property. Transfer of ownership of a house in consideration of transfer of ownership in an agricultural land is exchange. Similarly, transfer of ownership of a house in return of transfer of ownership of a motor-car is the transfer by way of exchange. Thus, where two persons (transferor and transferee) mutually transfer the ownership of one property for the transfer of ownership of another property, the transaction is exchange. Exchange, as defined in Section 118 includes change of a movable property with another movable property or change of movable with immovable property.

Definition of Exchange

Section 118 defines exchange in the following words :

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exchange."

30. A.I.R. 1995 S.C. 73.
31. *Mahimunda v. Manginla*, (1904) 31 Cal. 937.

The characteristic features of exchange are as under :

1. *Transfer of ownership*.—Exchange is a transfer of ownership in some existing property. The ownership of one party must be exclusive of the ownership of the other; therefore, when partition is effected it is not an exchange.¹ But, where A and B are co-owners of a property X and B is exclusive owner of a property Y and A transfers his share in X to B in consideration of B transferring Y to A, the transfer is exchange. Since exchange is transfer of absolute interest, when a lessee surrenders a lease and landlord grants another lease to him in consideration of such surrender, the transaction is not an exchange.

2. *Properties need not be immovable*.—Both properties which are the subject-matter of exchange, need not be immovable. Ownership in immovable property may be transferred in return of ownership in movable property. Transfer of immovable with another immovable plus some movable, is also an exchange. Similarly, where property is transferred for consideration of another property and some money is also paid for bringing out equality of valuation, the transaction is exchange. Thus, transfer of a house valuing Rs. 10,000 in consideration of another house valuing Rs. 8,000 plus Rs. 2000 in cash is transfer by way of exchange. A transaction where consideration for the transfer of certain properties are shares in a limited company, is an exchange.²

3. *Exchange includes barter*.—Transfer of ownership in some movable property in consideration of transfer of ownership in another movable property is technically called *barter*. Definition of exchange given in this section includes barter. Where both the properties are movable, Section 120 of this Act, which deals with rights and liabilities of the parties, and also the provisions of the Sale of Goods Act, both are applicable.

4. *Mode of Transfer*.—Second paragraph of Section 118 provides that an exchange can be made only in the manner in which a sale is effected. Thus, the transfer by way of exchange must be completed with the same formalities as are required for completion of sale under Section 54 of this Act. Where both properties are movable, exchange may be effected by delivery of possession; registration is not compulsory. If properties are immovable and are of the value exceeding Rs. 100, registration of the document is compulsory.³ Where immovable properties are valued less than Rs. 100, registration is optional; it is not compulsory and the delivery of possession is sufficient to complete the transfer. However, it is not necessary that word 'exchange' is used in the document. In *Banwari Lal v. Asstt. Director of Consolidation*,⁴ the parties

decided to transfer their rights in respective plots situated in two villages, apparently for convenience in cultivating. The Allahabad High Court held that this was in exchange and mere mention of sale consideration in the sale deed did not make it a sale. It is significant to note that although an unregistered deed of exchange would not confer a legal title to the lands exchanged yet, a party to the exchange acquires full title to the property by continuous possession for over twelve years openly and adversely to the other party to exchanges.⁵

It may be noted that above all, for the validity of an exchange the deed of exchange must be a valid contract in all respects. If the deed of exchange itself is a void contract, the exchange of properties cannot take effect. For example, in *Sitiani Jena v. Khetramohan Jena*,⁶ evidence on record showed that deed was executed to compromise criminal proceedings between the parties. The deed of exchange could be obtained from the registration office only after the criminal case were compromised. On these facts, the Orissa High Court held that since the object of the contract of exchange was unlawful under Section 23 of the Indian Contract Act, the contract (deed) of exchange was void. The Court observed that since the deed of exchange was executed with the intention of compromising a criminal case pending between the parties, it is clearly hit by Section 23 of the Contract Act and, therefore, it is not a valid contract.

Punjab.—In Punjab where this Act is not in force, the principles of Section 118 are applied on the ground of equity, justice and good conscience.

119. *Right of party deprived of thing received in exchange*.—If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing of any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

Liability for loss due to defect in title

This section deals with the rights of a party who is deprived of lawful title in the property received by him in exchange. Exchange is mutual transfer of ownership between two persons. Accordingly, both covenant implicitly to exchange ownership and perfect title in the property to each other. Section 119 gives certain rights to a party who does not get perfect title in the property received by him. Where a party to exchange (or, any person claiming under

1. *Sar Satya Kumar v. Satya Kripal*, (1909) 10 Cal. L.J. 503; 3 I.C. 247 cited in *Mulla: TRANSFER OF PROPERTY ACT*, Ed VIII (reprint 1950), p. 779.

2. *Comm. of Income Tax v. Motor & Gen. Stores (P) Ltd.*, AIR 1968 SC 200.

3. *Birbal v. Bafji Desai*, AIR 2008 NOC 1874 (HP), the reasons for signing the exchange decree were to avoid litigation and to run affairs properly; valuation of lands to be exchanged was more than Rs. 100. The document was held to be compulsorily registrable. *Nirvukti Kashidra Binnar v. Sakshinul*, AIR 2009 Bom 93, exchange of property worth Rs. 100 or more, has to be effected by registered instrument.

4. (1981) All. L.J. 1239.

5. *Kastinath v. Mackchid*, AIR 1939 All. 504.

6. AIR 2002 Ori. 195; see : *V. Narasimharaju v. V. Garramurthi Raju*, AIR 1963 SC 107 and, *Ousaph Poulo v. Catholic Union Bank Ltd.*, AIR 1965 SC 165.

him) is deprived of the property due to defect in its title, he has following two remedies :

- (a) He may claim return of the property transferred by him to other party *provided* the property is still in the possession of that party, or
- (b) He may claim compensation from the other party for the loss incurred due to such defective title.

This section affirms the rule that each party warrants his title to the things which he had transferred by way of exchange. It contains an implied covenants of title just as Section 14 of Sale of Goods Act, 1930 provides in respect of sale of goods. The rights available to the aggrieved party are either return of the property or, if such return is not possible, to claim compensation. Thus, equity would suggest that if one of the parties is unable to get the possession of property which he is entitled to receive in exchange, he has right to claim the return of his own property transferred by him.⁷ In *Jattu Ram v. Hukim Singh*,⁸ there was a defect in the title of a land received by one party to exchange due to false entries made by *pattwari* and this party was deprived of some portion of land as per stipulation. The Supreme Court held that entries made by *pattwari* in the official record do not create title and the opposite party was liable to return the land to that extent.

The right to sue the other party or any person claiming under him is available so long as they are in possession of the same. For example, A exchanged certain properties from B but A is deprived of a portion of property which he got from B because it has passed into the possession of a trespasser. Here A's remedy is to claim compensation from B not from the trespasser. Where the person deprived of complete and perfect title claims damages, he is entitled to sue not only the other party but also his legal representatives, or donee if he is in possession of that property.

However, the rights of a party deprived of defective title are subject to any contract to the contrary. A covenant cannot be implied if the parties agree otherwise. Where a party binds himself to pay some money in case the other party is deprived of the property, there is a contract to the contrary and the other party on being deprived cannot recover his property under this section.

120. Rights and liabilities of parties.—Save as otherwise provided in this Chapter, each party has the right and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties same as those of seller and buyer

Section 120 provides for the rights and liabilities of the parties to exchange. But, it does not specifically mention them. Under this section the

rights and duties of the parties to an exchange of immovable property are the same as that of seller and buyer given in Section 55. Since exchange also includes barter, i.e., exchange of movables, the rules of the Sale of Goods Act, 1930 in this regard may apply where the properties are movable. However, since there is no price or money consideration, therefore, there is no charge for unpaid price even where some money is paid to equate the value of a property.

121. Exchange of money.—On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Warranty of genuineness of money

Exchange is mutual transfer of ownership in movable or immovable property. Where money is transferred in consideration of money, the transfer is exchange. For instance where a person gives a hundred rupee currency note to another and takes from him ten currency notes of ten rupees, the transaction between them is called exchange. Section 121 provides that where money is changed mutually between two persons there is implied covenant that each party warrants the other genuineness of the money. Therefore, when money of one party is counterfeited or a fake currency note, there is no valid consideration in the transaction and the exchange is void. Accordingly, the other party who is deprived of his right to get genuine money in return of his own genuine money, would be entitled to recover the money paid by him. Thus, if A gives a fake hundred rupee currency note to B in consideration of ten genuine currency notes of ten rupees, B is entitled to recover the ten currency notes of rupees ten which he had paid to A.

7. *Hari Shantaram Mishra v. Vice-Chairman, K.D.A.*, AIR 2001 All 139.

8. AIR 1994 SC 1653.

VII

OF GIFTS

122. "Gift" defined.—"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.—Such acceptance may be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

SYNOPSIS

- Definition of Gift.
- Essential Elements of Gift.
- Transfer of ownership.
- Existing property.
- No consideration.
- Voluntarily.
- Acceptance of gift.

Gifts

Gift is transfer of ownership without consideration. Transfer without consideration is called a gratuitous transfer. A gratuitous transfer may take place between two living persons or, it may take place only after the death of the transferor. Gift may, therefore, be either *inter vivos* or, testamentary. Gift *inter vivos* is gratuitous transfer of ownership between two living persons and is a transfer of property within the meaning of Section 5 of this Act. Gift testamentary is called a will which is transfer by operation of law and is outside the scope of this Act. A gift made during apprehension of death is called a gift *mortis causa*. Such gifts are also excluded from the Chapter.¹ The provisions of this Act are applicable only to gifts *inter vivos*.

1. Under Muslim law a gift made in apprehension of death is called gift during *marz-ul-munt* and is interpreted as will. Gift made by a Muslim is called *Hiba*. Both of these gifts are excluded from this Chapter by Section 129 of this Act. *Chhotelal Dhanu Kaur v. Rajnani Bandaram Kaur*, AIR 2009 Chh 43, the document described as 'gift' was such that the interest in the property was intended to be transferred only on the executant's death, the document was held to be a will and not a gift.

Definition of Gift.—Section 122 defines gift as under :

"Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person called the donor, to another, called the donee, and accepted by or on behalf of the donee."

Gift, as defined in this section, is gratuitous transfer of ownership in some existing property made voluntarily. The definition includes gift of both movable as well as immovable property. The transferor is called *donor* and the transferee is called *donee*.

Donor.—Donor must be a competent person. For competency, the donor must have capacity as well as right to make the gift. If the donor has capacity to contract he is deemed to have capacity to make gift. Thus, at the time of gift, the donor must be of the age of majority and must have a sound mind. Gift by minor or insane person is void. Juristic persons, such as, registered societies or firms or institutions are also competent to make gift. Besides capacity, donor must also have right to make gift. Gift being transfer of ownership, the donor must have ownership rights in the property at the time of gift.

Donee.—Donee need not be competent to contract. Donee may be any person in existence at the date of making of gift. A gift made to minor or insane person or even in favour of a child in mother's womb is valid provided it is lawfully accepted by a competent person on his (her) behalf. Donee too may be a juristic person. Juristic persons, such as, firms, companies or institutions are deemed to be competent donee and gift made to them is valid. However, donee must be ascertainable person. Gift made to public in general is void. If ascertainable, donee may be two or more persons.

Essential Elements of Gift.—The essentials of valid gift are given below :

- (1) There must be transfer of ownership.
- (2) The property must be existing property.
- (3) Transfer is without consideration.
- (4) The transfer is made voluntarily, *ie.*, with free consent.
- (5) Gift must be accepted by transferee.

1. **Transfer of Ownership.**—Gift is transfer of ownership, *ie.*, absolute interest. The transferor (donor) must divest himself of the absolute interest in the property and vest it in the transferee (donee). The donor must intend to pass on all the rights and liabilities in respect of property to donee. The donor must have the right of ownership to enable him to transfer ownership. Where the owner bequeathed his property to a trust and left nothing for his wife and her foster son, the gift of such properties by the wife was held to be ineffective. There was nothing to show that she had acquired any title to the property in any manner.^{1a}

1a. *Kashim Bai v. V. Jothoji Rao*, AIR 2014 NOC 166 Kar.

Nothing less than ownership may be transferred by way of gift. However, like other transfers, gift may also be made subject to certain conditions. But, conditional gift must not be against any of the provisions laid down under Sections 10 to 34 of this Act.^{1b}

2. Existing Property.—The property, which is the subject matter of gift, may either be movable or immovable. It may be tangible or intangible. Actionable claims or mortgages are intangible properties and may be gifted. Property may be of any kind but two conditions are necessary. *Firstly*, the property must be in existence at the date of making of the gift. Gift of future property is void. Where the sale of a house in favour of A is completed on 5th November, 1993 but A had made a gift of that house to B on 5th October, 1993 the gift to B is void. Since on the date of gift A himself was not owner of that house, the gift is void. *Secondly*, the property must be transferable within the meaning of Section 5 of this Act. Gift of *spes-successionis* or mere chance of inheriting property or mere right to sue, is void. In *Danodaran Kaviraj v. T.D. Rajappa*,² a mother settled her properties by way of gift in favour of a son for settling dispute between family only for consideration that the son relinquished his right to future shares in the property left by her. Kerala High Court held that the deed was not a gift because it purported to transfer a share to be received by son in future.

3. No Consideration.—An essential feature of a gift is that it must be gratuitous. Ownership must be transferred without any consideration. The value of consideration is immaterial. Even a negligible property or, very small sum of money given by transferee in consideration of a transfer of ownership in a big property would make the transaction either a sale or exchange. The word consideration has the same meaning as given in Section 2 (d) of the Indian Contract Act. It must be a pecuniary consideration, i.e., it must be valued in terms of money or property. Mutual love and affection is not a pecuniary consideration. Property transferred in consideration of love or affection is a transfer without consideration, hence a gift. A gift-deed was executed by a mother in favour of her only daughter and the daughter promised to look after and maintain the mother during her life. It was held by the Court that gift was made on account of natural love and affection and not in consideration of the promise made by the daughter.³ A father gifted his Bhumi-dhari land to his daughter. A sum of Rs. 40,000/- was mentioned in the gift deed as valuation of the property donated, and not as consideration, because that was necessary for the purposes of stamp duty. The Court held that the transfer was by way of gift and not sale.⁴ A transfer of property made in consideration of 'services' rendered by donee is a gift. A property transferred in consideration of donee undertaking the liability of donor is not gratuitous; therefore, it is not a gift because liabilities evolve pecuniary obligations.

1b. *Balchandran v. Sujatha*, AIR 2014 Ker. 80, the gift deed was found to be valid, property became transferred, no partition of such property could be claimed.

2. AIR 1992 Ker. 397; See also *Commr. of Income-tax, Kampur v. Dr. R.S. Gupta*, AIR 1987 S.C. 785.

3. *Munni Devi v. Chhoti*, AIR 1983 All. 444.

4. *Chaudhary Ramesar v. Prabhavati Phool Chand*, AIR 2012 All 173.

4. Voluntarily.—The donor must make the gift voluntarily. 'Voluntarily' here means that donor has made the gift in exercise of his own free will and his consent is a free consent. His consent is free when he has complete freedom of making the gift without any force, fraud, coercion or undue influence. The donor must have an independent and free will in executing the deed of gift. Where coercion or undue influence has been exercised on the donor, it cannot be said that the gift was made voluntarily. Voluntary act on the part of the donor also means to suggest that the donor has executed the gift-deed in full knowledge of circumstances and nature of the transaction. Where a gift is made by a *Purdanshin* lady who mostly remains inside the house, it must be established beyond reasonable doubt that she executed the gift-deed voluntarily. The burden of proving that the gift was made voluntarily with free consent of the donor, lies on the donee.⁵

The donor was old, illiterate and ailing lady. The donee was her collateral. He was the dominant party and was able to exercise active influence. The woman deposed that she was taken to the house of the donee and *dhoomi* was given to her there to ward off an evil spirit. At that time two gift deeds were executed by taking her signatures under the pretext that she was signing her pension papers. As soon as she came to know, she took action challenging the gift deeds. The court held that it could not be said that she had executed the gift deeds voluntarily. She was positively acting under influence and had no independent advice. The deeds were set aside.⁶

Where the donee took advantage of old age and ill-health of the donor lady, the gift was declared to be void. Evidence showed that as the donor always wanted to help the donee and allowed him to make a house on a part of the land, the gift was not avoided to that extent.^{6a}

Another similar case came before the Jharkhand High Court.⁷ The donor was an illiterate old village lady having four daughters. The gift deed was in favour of only one daughter. It was the specific case of the plaintiffs (three daughters) that the husband of the youngest daughter procured the deed of gift in her favour from the executant who was in an unconscious state of mind. No attesting witnesses were examined to prove the document. There was no whisper in the deed of gift that the contents of the document were read over and explained to the executant who after full understanding executed the document. She being illiterate, ought to have consulted her husband. His absence created serious doubt about the genuineness of the transaction. None of the co-villagers or relatives were attesting witnesses of the gift deed rather, three strangers acted as attesting witnesses. The order that the gift deed did not confer any title, right or interest in the property on the donee was held to be proper.

5. *Ajmer Singh v. Alma Singh*, AIR 1985 P & H 315.

6. *Surjit Singh v. Bimla Devi*, AIR 2008 NOC 969 (HP).

6a. *Sulender Singh v. Priyam*, AIR 2014 NOC 236 HP.

7. *Indrasen Singh v. Yashashir Singh*, AIR 2008 NOC 1649 (Jhar).

5. *Acceptance of Gift*.—Gift must be accepted by the donee. Property cannot be given to a person even in gift against his (her) consent. The donee may refuse the gift, e.g., when it is non-beneficial property or, onerous gift. Onerous gift is a gift of such property the burden or liability (e.g., revenue or taxes etc.) of which exceeds its actual market value. The donee may refuse the offer of gift of such properties. Acceptance of the gift is, therefore, necessary.⁸

The acceptance may either be express or implied. Acceptance is implied if it is inferred from the conduct of the donee and the surrounding circumstances. When the donee takes possession of the property or of the title deeds, there is acceptance of the gift.^{9a} Where there was a clear recital in the gift deed that the donor was transferring his possession over his bhumi-dhari land and that the gift had been accepted by the donee. She had the right to get the property registered in her name in the Revenue Record. Even if the father remained in physical possession, the gift deed could not be invalidated considering the relationship between father and daughter.⁹ Where property is on lease, acceptance may be inferred upon the acceptance of the right to collect rents. However, when the property is jointly enjoyed by donor and donee, mere possession (which the donee already had before gift) cannot be treated as evidence of acceptance. When the gift is not onerous (*i.e.*, does not have liabilities on the property gifted) a slight evidence is sufficient to prove that the gift has been accepted by donee. Mere silence of the donee is indicative of the acceptance provided it can be established that the donee had knowledge of the gift being made in his favour.¹⁰

Where the deed of gift categorically stated that the property had been handed over to the donee and he had accepted the same and the document is registered, a presumption arises that the executants are aware of what was stated in the deed and also of its correctness. When such a presumption is coupled with the recital in the deed that the donee had been put in possession of the property, the onus of disproving the presumption would be on the donor and not the donee. The burden of rebutting such a presumption was a heavy one.¹¹

Where the donee herself admitted that she did not know about existence of the gift deed and she came to know of it only when she received the settlement record, the court said that this fact showed that the donee had not accepted the gift at the time of its execution of the gift deed. The donee did not get any right or title through the gift deed.¹²

8. *Shri Kishan v. Hari Narain*, AIR 2008 NOC 567 (All) : (2007) 6 ALJ 707, acceptance has to be that of the donee, not donor. The fact that the donor was not shown to have accepted the gift after its execution cannot be a ground for saying that the gift was not proved.

8a. *Sudhanshu Kumar Das v. Jagdish Chandra Das*, AIR 2014 Gau 19, donees put into possession, land revenue being paid by them, final khataans also issued in their favour, sufficient indication of acceptance.

9. *Chandrabhraman v. Prabhakari Pooi Chandi*, AIR 2012 All 173.

10. *Venudhri Valluppi v. Pulihya Puraipili*, AIR 1986 Ker 110.

11. *Asokan v. Lakshminakshi*, (2007) 13 SCC 210.

12. *Ukaili Musammi v. Kishori Sahu*, AIR 2008 Ori 138.

Where donee is incompetent to contract, e.g., minor or insane, the gift must be accepted on his behalf by a competent person. Gift may be accepted by guardian on behalf of his ward or by a father or mother on behalf of the son where the son is incompetent on the date of gift. Where gift is accepted by guardian on behalf of minor, the minor on attaining majority may avoid the gift.

However, where the donee is minor but has attained the age of discretion (e.g., 16 or 17 years) and the donor is natural guardian, a silent acceptance by the donee is deemed to be an implied acceptance of the gift. In *K. Balakrishnan v. K. Kamalan*,¹³ as a natural-guardian, a mother gifted certain property to her minor son aged 16 years. The possession and right of enjoyment was, however, retained by her. The Supreme Court held that gift was not revocable on account of non-acceptance of the gift by a minor. The Apex Court explained that, "ownership of property by minor can be presumed by silent acceptance, particularly when minor is an educated boy of 16 years, had knowledge of execution of gift". The Court further held that "non-delivery of possession of the gifted property, non-exercise of rights of ownership over it and failure to get property initiated in his favour on attaining majority, are not circumstances negating presumption of implied acceptance of gift by minor".

Where donee is a juristic person, the gift must be accepted by a competent authority representing such legal person. Where gift is made to a deity, it may be accepted by its agent, e.g., the priest or manager of the temple.¹⁴

The second paragraph of Section 122 provides that acceptance must be made during the life-time of the donor and while he is still capable of giving. Gift being bilateral transaction between two living persons, the acceptance of the (offer of) gift must be completed before the donor (offerer) dies or becomes incompetent. There is no acceptance if the acceptance comes after the death of the donor. If the gift is accepted during the life of donor but the donor dies before registration and other formalities, the gift is deemed to have been accepted and the gift is valid. In *S. Sumitra v. State*,¹⁵ a land was endowed upon a 'deity' by way of gift. The gift was made to a religious endowment and was to be accepted by the State Government. The Government ordered for the execution of the gift-deed but the donor died before the official order could be issued and communicated to the donor. Karnataka High Court held that the gift was validly accepted and the Government order issued earlier for actual execution of gift was not invalidated by death of the donor.

The last paragraph of this section provides that if donee dies before acceptance, the gift is void.

Condition attached to gift.—A condition was attached to the gift that the donee would serve donor till his life time. The donee complied which the condition till the time of the donor's demise. The gift became absolute. The

13. AIR 2004 S.C. 1257. (See also Sec. 6 for gift of 'restricted interest').

14. *Kann Bhanoo v. Ramnathwar Prasad Singh*, AIR 1938 Oudh 26.

15. AIR 1993 Kan. 108.

legal heirs were not allowed to claim the property on the ground that service in favour of legal heirs was not continued.¹⁶

Gift and Will compared.—In a case before the Supreme Court there was a stipulation in the document that the executant was to keep possession of the property in question, utilise its income for repaying loans and for its maintenance. After life-time of the executant, the property in question was to go absolutely to his sons. It was held that the document did not create any right, title or ownership in the sons when it was executed or during the life-time of the executant. Subsequent events were of no use in construing the document. The intention of the executant has to be ascertained from the words employed. The document was not a gift. Revocability of a Will distinguishes it from a gift.^{16a}

123. Transfer how effected.—For the purposes of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

SYNOPSIS

- Modes of making Gift.
- Immovable Properties.
- Movable Properties.
- Actionable claims.
- Gift to Idol.
- Gift to minor.

MODES OF MAKING GIFT

This section deals with formalities necessary for completion of a gift. Unless these formalities are completed, the legal title does not pass on to the donee and the gift is not enforceable at law. Section 123 lays down two modes for effecting a gift depending on the nature of property. Registration is necessary for the gift of immovable properties. Where the property is movable, it may be effected by delivery of possession.

Immovable Properties.—A gift of immovable property must be made only through a registered document. Irrespective of the valuation of property, registration is necessary for the gift of an immovable property. Gift of a piece of land valuing less than rupees one hundred must also be registered. Registration

of a document including gift-deed, implies that the transaction is in writing, signed by the executant (donor), attested by two competent persons and duly stamped before the registration formalities are officially completed. In *Gomibai v. Multulal*,¹⁷ the Supreme Court had held that in the absence of written instrument executed by donor, attestation by two witnesses, registration of this instrument, and acceptance thereof by the donee, the gift of immovable property is not complete.

Without due compliance of these formalities, the gifted-property cannot be said to have been transferred to the donee. The doctrine of part-performance is not applicable to gifts. Therefore, the donee who takes possession of a land under unregistered gift-deed cannot defend his possession on being evicted. However following two points are important with regard to the requirement of registration :

(i) Although registration of gift of immovable property is must but, the gift is not suspended till registration. A gift may be registered and made enforceable at law even after the death of the donor provided the essential conditions are fulfilled.

(ii) Where the essential conditions for a valid gift are not fulfilled, registration shall not validate the gift.

The registration cannot validate a gift in the absence of any of the essential elements. On the other hand, without registration title cannot pass even if the essential ingredients are present. Accordingly, although a gift of immovable property may be made by registered deed, yet, if it is not accepted by donee the gift is inoperative.¹⁸

The case was under the Government Grants Act, 1895 (Section 2). The Ruler permitted the plaintiff to occupy and reside on a portion of the land after closure of the orphanage. It was mentioned in the deed that the plaintiff and his heirs and successors would enjoy that land and might get their names recorded in settlement records. The court said that it was a benevolent concession by the Ruler in favour of the plaintiff and was in the nature of a grant rather than a gift. This was particularly so because there was no indication in the document that the Ruler as a donor gifted the land, and the plaintiff as a donee accepted the same. No witness signed or attested the document as is required in a gift transaction under Section 123, TP Act.¹⁹

Delivery of possession, not necessary.—The Supreme Court has observed that Section 123 supersedes the rule of Hindu Law insofar as such rule required delivery of possession to the donee. Under the TPA provisions in Sections 122

17. AIR 1997 SC 127; *Nutanji Bhirniji Family Trust v. Sub-Divisional Officer*, AIR 2002 NOC 1934 (Bom), registration compulsory irrespective of value of immovable property being gifted.

18. *Radhika Devi v. Rajesh Kumar Niranjan*, AIR 2009 Pat 109, non-appearance of the attesting witnesses, not a cause for adverse presumption about the genuineness of the sale deed for gift particularly when the executant had already stated in her written statement that she had executed the deed. The gift was held to be genuine.

19. *Shri Kurn v. State of Orissa*, AIR 2008 Ori 94.

16. *Chinnai v. Naresht Kumar*, AIR 2010 P & H 55.

16a. *Mahesh Samud v. Eopen Eopen*, AIR 2013 SC 532.

and 123 there is no sign of any requirement that in the case of gift of immovable property there should be delivery of possession. The gift in this case was registered and accepted by donee. Recitals in gift deed showed that there was absolute transfer of title to the donee. The mere fact that the donor retained the right to use the property during her life time did not in any way affect the transfer of ownership from herself to donee.^{19a}

Movable Properties.—Gift of movable properties may be completed by delivery of possession. Registration is optional; it is not compulsory. Accordingly, gift of a movable property effected by delivery of possession is valid irrespective of the valuation of property. The mode of delivering the property to donee depends upon the nature of property.²⁰ All that is necessary is that donee gets title as well as possession of the gifted property. Delivery of goods (movables) may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the property in possession of the transferee (donee).

Actionable claims.—As defined in Section 3 of this Act, actionable claims are unsecured money debts or right to claim movables not in possession of the claimant. Actionable claims are beneficial interests in movable. They are, therefore, intangible movable properties. Transfer of actionable claims is governed by Section 130 of this Act. It provides that actionable claims may be transferred (including by way of gift) by an instrument in writing signed by transferor (donor) or his duly authorised agent. Registration and delivery of possession is not necessary.

Gift to idol.—There is a conflict in the judicial decision regarding the mode of effecting gifts to an idol. According to the Allahabad and Patna High Courts,²¹ gift to an idol must be made through a registered document. But, according to the Madras High Court²² although an idol is recognised as a juristic person but since it is not strictly speaking a living person, a gift to an idol is outside the scope of this Act; therefore registration is not necessary. The Supreme Court has endorsed this view. It said that as the suit property was dedicated to a deity, it did not require registration, and also because it constituted a religious trust. Gift to an idol may be oral. It may also be effected by an unregistered instrument.²³

Gift to minor.—A widow gifted her self-acquired property by executing a gift deed in favour of a minor. Persons who were not her heirs, cognates or agnates were not allowed to question the disposition, the donee being a minor, at the time, the property was put in possession of the donee's father, and it was looked after by the father on behalf of the minor. It was held that the father had no right to execute a will giving the property to the sons of his second wife.

19a. *Kankunila Rajanm v. K. Srinivasanm*, AIR 2014 SC 2906.

20. See Section 33 of the Sale of Goods Act, 1930.

21. *Manm Lal v. Radha Kishenj*, 36 LC 989 (All); *Dohsram v. Nandlal*, AIR 1929 Pat 591.

22. *Narsinharam v. Venkalingam*, AIR 1927 Mad. 536.

23. *Seshall Memorial Trust v. Vijaya*, AIR 2011 SC 389.

Oral evidence was not allowed to show that the donor always intended to gift the property to the father of the donee.²⁴

124. Gift of existing and future property.—A gift comprising both existing and future property is void as to the latter.

This section makes it clear that gift of future property is void. Where a gift is made comprising two properties of which one is existing at the date of gift but the other is not, the whole gift is not void. Only that part of the gift is void which relates to future property. For instance, A has a house which is owned by him. A had contracted to purchase a piece of land adjacent to this house but sale in his favour is yet to be completed. A makes a gift of both the properties to B. Gift of house is valid but the gift of piece of land is void even though the land was acquired subsequently by A. Gift of future property is merely a promise which cannot be enforced at law. Gift of future income of a property before it had accrued would also be void under this section.

125. Gift to several, of whom one does not accept.—A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift may be made to two or more persons jointly. But, for validity of such gift, acceptance by all the donees is necessary. If any donee is not competent to accept the gift, acceptance on his behalf must come from his guardian. This section provides that where a gift is made to several donees of whom any one donee does not accept the gift, the gift on his part only, is void. Gift in favour of other donees stands valid. For instance, A makes a gift to B, C and D without specifying their shares in the property. Gift is accepted by B and C but there is no acceptance by D or his guardian (if D be incompetent). Since the respective shares have not been specified, the shares of each are equal, i.e., one-third each. But, D has not accepted the gift, therefore, gift on his part (one-third) is void. This one-third of D's share shall revert back to A. This share would not be added to the shares of B and C. It may be noted that a gift is personal to the donee; therefore, when a gift is made to two persons jointly of whom one does not accept it, the other donee cannot take the whole gift. But, gift made to two donees jointly with the right of survivorship is valid and upon death of one the surviving donee takes the whole.²⁵

126. When gift may be suspended or revoked.—The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part as the case may be.

24. *Ramish Chand v. Tanchand*, AIR 2008 NOC 1170 (Bom). Such evidence is barred by Sections 91 and 92 of the Indian Evidence Act, 1872. *Chophu v. Board of Revenue*, AIR 2013 NOC 120 Raj, the daughter of the donor had no locus standi to question a completed gift, the transfer of the gifted property by her was not proper.

25. *Cherna Kannan v. Kannubi*, AIR 1973 Ker. 64.

A gift may also be revoked in any of the case (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations

- (a) A gives a field to B, reserving to himself with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime, A may take back the field.
- (b) A gives a lakh of rupees to B, reserving to himself with B's assent the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds goods as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to A.

SYNOPSIS

- Revocation by mutual agreement.
- Revocation by rescission as contracts.
- No revocation on any other ground.
- Subsequent conduct of donee after acceptance—Irrelevant.
- *Bona fide* purchaser.

SUSPENSION OR REVOCATION OF GIFTS

Gift is transfer of ownership without consideration. Like other transfers, gift too can be made subject to certain conditions. Donor may make a gift subject to a condition of its being suspended or revoked. But, such gifts would then be governed by those provisions of this Act which regulate conditional transfers. Accordingly, if a gift is made subject to condition of its being revoked in future the condition must be valid and enforceable under those provisions. Section 126 provides as to how a gift may be suspended or revoked. It lays down two modes of revocation of gift: (i) revocation by mutual agreement of donor and donee and, (ii) revocation by rescission as in the case of contracts.

Revocation by Mutual Agreement.—Donor and donee may agree that the gift shall be suspended or revoked upon the happening of an event not dependent on the will of the donor. The condition revoking the gift must be express; it should not be merely in the form of a wish or desire. In other words, the condition on the non-fulfilment of which the donor may revoke the gift must be expressly laid down in the deed. A gift of certain properties was executed in lieu of the past and future services rendered by donee to donor. But failure of donee to render services to donor or to maintain donor in future, was not specified to be a condition for revocation of the gift-deed. The *Himachal Pradesh High Court*²⁶ held that since the condition of revocation of gift upon donee's failure to

render services to donor was not laid down in the deed, it was unconditional gift and, therefore, cannot be revoked by the donor. Where a condition has not been expressly laid down in the gift-deed, it might be treated simply as the wish or desire of the donor and is not a condition upon the breach of which gift could be made revocable by donor.

However, even though a condition is not laid down in the gift-deed itself, and has been provided under a mutual agreement separately but forms part of the transaction of gift, the condition would be valid and enforceable. In *Thakur Raghnathlal Malavi v. Ramesh Chandra*,²⁷ the facts were that the donor executed a gift-deed of a piece of land for the purpose of construction of a college on his land. The gift-deed was without any condition. But on the same day an agreement (between donor and donee) was executed to the effect that college on the gifted land should be constructed within six months from the date of execution of gift failing which the donor would have the right over the gifted land, i.e., gift would be deemed to have been revoked. Agreement stated further that the possession of land will be of the donor till the college is not built and in case the college is not built within said period, the donor will be entitled to take appropriate action in a Court of law and in the event the said college is constructed, the donor will have no right over the land. The Supreme Court held that from these terms as stated in this agreement it is clear that the gift was not absolute or unconditional; it is a gift subject to conditions for its revocation. The Apex Court held further that gift-deed and the agreement form part of one and the same transaction and are to be read together and given effect to accordingly.

The condition upon which a gift is to be revoked must not depend solely on the will of the donor. A gift revocable at the pleasure of donor is no gift at all. The condition or stipulation providing for revocation must have been mutually agreed upon at the time of gift. If such agreement is made after completion of gift, since the gift has already become absolute, it cannot be revoked. However, it is not necessary that stipulation for revocation is given in the deed of gift itself. What is necessary is that stipulation and gift both are made at the same time. They might be in two separate documents but must form part of the same transaction. That is to say, the stipulation must relate to the same gift which is to be revoked.

The condition for revocation of gift is a condition subsequent. It must be valid under the provisions of law given for conditional transfers. The condition totally prohibiting the alienation of property is void under Section 10 of this Act. Therefore, if the gift is made revocable with such condition, the condition itself being void, the gift is not revoked.²⁸

It is also necessary that the condition upon which the gift is agreed to be revoked must be a condition subsequent the fulfilment of which is not dependent on the will or desire of donor. The condition subsequent must be in the nature of

26. *Moel Raj v. Jammu Devi*, AIR 1956 HP 117.

27. AIR 2001 SC 2340.

28. *Jyotee Singh v. Nandan Moha*, AIR, 1982 Pat. 22.

future event beyond the control of donor. For example, A makes a gift of his field to B reserving to himself with B's assent the right to take back the field in case B and his descendants die before A. Here the condition upon which the field given in gift is to be revoked is a condition depending on uncertain future event not depending on the will of A. Therefore, if B dies without descendants in A's life-time, the gift is revoked and A may take back the field.

Where the stipulation provide for revocation of gift at the will or pleasure of donor the stipulation is void and gift is not revoked although such stipulation is mutually agreed upon by donor and donee. Gift revocable at the will of donor is void. For instance A makes a gift of one lakh of rupees to B reserving to himself with B's assent the right to take back at his (A's) pleasure Rs. 10,000/- out of this amount. The gift as to Rs. 90,000/- is valid but as regards Rs. 10,000/- the gift is void, i.e., it shall continue to belong to A. Law shall consider that no transfer of Rs. 10,000 was made at all.

Revocation by Rescission as Contracts.—Gift is gratuitous transfer of ownership made voluntarily. If it could be proved that the gift was not made voluntarily, i.e., the consent of the donor was not free, the gift must be revoked. Gift is always preceded by an express or implied contract; offer by donor and acceptance by donee. If the preceding contract itself is rescinded or revoked there is no question of taking place of transfer (gift) made under it. Accordingly, under Section 126 a gift is revoked also on any of the grounds on which it might be rescinded has it been a contract. Section 19 of the Indian Contract Act provides that "Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained". Thus, where the gift is not made voluntarily because of any of the factors mentioned above, the gift may be revoked by the donor. It is to be noted that this section deals with revocation which means rescission or repudiation of gift; it does not deal with cases where gift is void, e.g., for want of donor's title. So, where the donor's consent has been obtained by coercion, undue influence, fraud or misrepresentation the donor has option to repudiate or revoke the gift. If he does not exercise this option, the gift is not revoked. Gift may be revoked on the above-mentioned grounds only by donor; he cannot assign this right to any other person. However after donor's death, his legal heirs may sue for the revocation of gift on any of these grounds.

The period of limitation for the revocation of gifts on the ground of fraud, coercion, misrepresentation or undue influence is *three years* from the date on which such facts are known to the plaintiff (donor).²⁹ The right to revoke the gift on the above-mentioned grounds is lost when the donor ratifies the gift either expressly or by his conduct.

No revocation on any other ground.—Except on the ground of (a) condition subsequent not depending on the pleasure of donor and (b) on the grounds justifying of a contract, a gift cannot be revoked on any other ground. A

gift deed was validly executed in favour of the donee. It was held that a simultaneous claim by the donor that the gift deed was revoked unilaterally by him and lodged for registration was not valid as there was no participation by the donee.³⁰

Subsequent conduct of donee after acceptance—Irrelevant.—A father executed a registered deed of gift in favour of his son. He had done it because of love and affection for the son and also to enable him to live a peaceful life. There was no proof of undue influence. The donee remained out of India for a long time. In the meantime the gift deed remained with the donor and he also kept paying taxes. There was no mutation for that period in the revenue records. The Supreme Court held that these circumstances were not sufficient in themselves to show that the execution of the gift deed was not voluntary. The deed could not be rescinded on the premise that it was an onerous gift and that the donee had failed to fulfil the condition for the gift of contributing towards the marriage of the donee's sister the specified sum. Once a gift is complete, it cannot be rescinded for any reason whatsoever. The subsequent conduct of the donee is not a ground for rescission of a valid gift.³¹

Bona fide Purchaser.—The last paragraph of this section protects the interest of a *bona fide* transferee for value without notice of donor's right of revocation. For example, A makes a gift of his house to B with a condition that he shall revoke the gift if B's son does not take up the studies of law after graduation. B sells the house to C. C has no notice of any such condition. After graduation B's son does not join the law course. A cannot revoke the gift because C's interest shall be affected. If C has notice of such condition or that C was a gratuitous transferee, A could have revoked the gift.

127. Onerous gifts.—When a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gifts to disqualified person.—A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

30. *Shree Avona v. Madan Mohan Bhojli*, AIR 2009 NOC 333 (Bom.) ; *Fazluliah Khan v. State of A. P.*, AIR 2012 A.P. 163, a gift was completed in all respects including registration and possession. An *ex parte* cancellation deed and its registration were held to be not valid.

31. *Asokan v. Lakshminarayana*, (2007) 13 SCC 210. *Kamalakanta Mohapatra v. Pratap Chandra Mahapatra*, AIR 2010 Or 13, deed of gift once executed and registered cannot be revoked until mandatory requirements of the section are not fulfilled.

29. See Article 59, Indian Limitation Act, 1963.

Illustrations

- (a) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.
- (b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

SYNOPSIS

- Onerous Gifts.
- Disqualified Donee.

ONEROUS GIFTS

Onerous means 'burdened'. Onerous gift is a gift of such property which is burdened with liabilities. It is a gift of non-beneficial property. If the market value of a house is say, Rs. 10,000, but the taxes, other public charges or dues on it are worth Rs. 15,000, the house is an onerous property. Gift of this house would be liability for the donee rather than any asset. It is obvious, therefore, that he would not accept the gift. But, if in *one gift* some property is onerous while the rest is beneficial the donee would like to accept beneficial part of gift and would reject it onerous part.

Section 127 provides that where a single gift consist of several properties some of which are onerous and the others are beneficial, the donee must accept the whole gift—he cannot be allowed to accept beneficial part of gift and reject the onerous one. The principle underlying this rule is based on the maxim: *quisquis commodum debet et sentire onus* which means that "one who accepts the benefit of a transaction must also accept the burden of it". This rule is similar to the doctrine of election. When two properties, one onerous and the other prosperous, are given in gift to a donee in the same transaction, the donee is put to election. He may accept the gift together with onerous property or reject it totally. If he elects to accept the beneficial part of gift, he is bound to accept the other which is burdensome.

Illustration

A has shares in X which is a prosperous company and also shares in Y which is a company running in loss. A makes a gift to B of all his shares in both the companies. B refuses to accept the shares in company Y. B cannot take the gift of shares in X.

It is to be noted that where a donee accepts an onerous gift, it is implied that he accepted also the onerous conditions (e.g., debts and other liabilities) attached to some of the properties.

However, for application of this section it is necessary that there must be a single transfer of both such properties. That is to say, onerous and beneficial properties are transferred by way of a single (one) gift. If a gift is made in the form of two or more independent gifts to the same person, the donee is at liberty to accept the beneficial and refuse the onerous property. Since the gift are independent of each other, i.e., do not form part of the same transaction, the donee in such cases is not bound to accept both the gifts.

Illustration

A having a lease for a term of years of a house at a rent which is more than the house can be let for. He gives the lease to B and as a separate and independent transaction gives to B also a sum of money. B refuses to accept the lease because it is not beneficial to him. But he does not forfeit his claim to money; he would get the money.

Disqualified Donee.—Where an onerous gift is made to a disqualified donee, e.g., minor and such donee accepts the gift, he has a right to repudiate the gift on attaining the age of majority. An onerous gift made to a minor donee and accepted by him does not become binding on him unless on attaining majority he ratifies the acceptance. On attaining majority he may accept or reject the whole gift. If on attaining majority he retains the properties, it is implied acceptance of the gift and in this situation he would be bound by it. However, as regards donor, the gift is complete as against the minor donee as soon as the minor accepts the gift. Donor cannot take back the property unless the minor on attaining majority rejects the gift at his option. If the donee dies during his minority, the property shall pass on to the legal heirs of the donee, the donor cannot revoke the gift as being incomplete.³²

128. Universal donee.—Subject to the provisions of Section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

UNIVERSAL DONEE

Universal donee is a person who gets all the properties, movable or immovable, of the donor under a gift. Where donor makes gift of his whole property without retaining anything for himself, the donee is called an 'universal donee'. To constitute a universal donee, it is necessary that gift to him must consist of donor's whole property. If any property movable or immovable is left with the donor, the donee is not universal donee. English Law does not recognise the concept of universal donee; under English Law, universal succession is possible only in the event of death or bankruptcy of a person. However, universal donee has been known to Hindu Law. Generally, when a person renounces the worldly-life and takes up spiritual life, e.g., becomes

32. *Subramania Ayyar v. Sthina Lakshmi*, (1897) 20 Mad. 147.

Sanjay or said he makes gift of all of his properties. It is deemed to be his oral death for all worldly dealings. The person who gets each and every kind of property of donor, is universal donee and he may be said to have succeeded to donor's all assets and liabilities.

Section 128 lays down that where a gift consists of donor's whole property, the donee is personally liable for all the debts and liabilities of the donor due at the time of the gift. His liability is, however, only to the extent of the property comprised in the gift. This section incorporates an equitable principle that one who gets certain benefits under a transaction must also bear the burden thereon. When a person makes gift of all of his properties, it is obvious that he has left nothing for himself out of which dues or liabilities could be paid. Accordingly, this section provides that in such cases, the donee is personally liable for the donor's debts and other liabilities. Two significant points in this regard are :

(i) If some property, movable or immovable is excluded from the gift, the donee is not universal donee. Salaries of a person are not his transferable assets under Section 6 (f) of this Act. Therefore, if donor is earning some money by way of salaries but has made gift of all of his movable and immovable properties, the donee is nevertheless universal donee.³⁴

(ii) Universal donee's liabilities are limited to the extent of the property received by him in gift. If the liabilities or debts exceed the market value of the whole property, the universal donee is not liable for the excess part of it.

Object of Section 128.—The object of this section is to protect the interest of the creditors of the donor. In the absence of the rule laid down in this section the interest of the donor's creditors would be defeated. After taking a big amount as loan, the donor may succeed in his dishonest intention of defrauding the creditor by making gift of his whole property to some near relative. This section entitles the donor's creditor to follow the property in the hands of universal donee. Section 53 of this Act also protects the interests of the creditors in case the debtor makes a transfer to defraud his interest. But, Section 128 is independent of Section 53. Under Section 53, the creditor is entitled to set aside a fraudulent transfer of immovable property. Under Section 128 the creditor is entitled to follow not only immovable but also movable properties which now are with the universal donee. Secondly, Section 128 provides a remedy to the creditor not only where the transfer is fraudulent but also where the donor made the gift with honest motive, e.g., for renouncing the world in search of spiritual gains.

This section is subject to the provisions of Section 127 (onerous gifts). Therefore, if the donee to whom donor's whole property has been given in gift may outrightly refuse to accept the gift if he finds that most of the properties are onerous, i.e., burdensome. He becomes universal donee only where he accepts the whole gift. However, as provided in Section 127, if the universal donee is

34. *Shakti Prasad v. Sri Venkateswari Chaudhary Finance Corp.*, AIR 1978 Andh Pra. 401.

minor, he is not liable for the donor's debts and dues unless he retains the properties after attaining the age of majority.

129. Saving of donations *mortis causa* and Mohammedan Law.—Nothing in this chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mohammedan Law.

This section exempts following two gifts from the operation of this chapter. The two gifts on which the provisions of this Act are not applicable are : (i) Muslim-gifts (*Hiba*), i.e., where the donor is a Muslim, and (ii) gifts of movable properties made in contemplation of death.

Where donor is Muslim, the gift is called *Hiba* and is governed by the rules of Muslim Personal Law. For valid Muslim-gift, the only essential requirement is declaration, acceptance and delivery of possession. Registration is neither necessary nor sufficient. Oral gift made by a Muslim is valid irrespective of the value of the property gifted. But, if the property is immovable worth Rs. 100 or more and the gift is made in writing, it must be registered under Section 17 of the Indian Registration Act, which is applicable to Muslim.³⁵ In order to render a gift a *Hiba*, the donor alone should be Muslim. Religion of the donee is immaterial. If a Muslim donor makes gift in favour of any non-Muslim, e.g., Christian or Hindu, the gift is *Hiba* and is exempted from the operation of Transfer of Property Act. A Muslim can make a gift orally. Even if it is made in writing, it does not become an instrument of gift. Registration is not necessary.³⁶

Gift made by a donor in contemplation of his death is *donatio mortis causa*. Under Muslim Law such gift is called death-bed gift or, a gift during *Murt-ul-Maut*. Under Muslim Law, gifts of movable as well as of immovable properties made in contemplation of death are interpreted as wills.³⁶ Section 129 exempts gifts made by Muslims in contemplation of death only of the movable properties from the operation of this Act.

34. *Inspector General of Registration v. Tejendra Begum*, AIR 1964 Andh Pra. 109 (F.B.).

35. *Hafizra Bani v. Shakti Prad*, AIR 2011 SC 1695 ; *Asghar Ali v. Tahir Ali*, AIR 2013 MP 151, essential requirements of gift were fulfilled, the gift deed was only a recital of the fact of prior gift, it was not contemporaneous with the gift registration was not required.

36. See Dr. R.K. Sinha, *THE MUSLIM LAW*, Ed. III, p. 197 for detailed account of interpretation of death-bed gifts.

SYNOPSIS

- Mode of Assignment (transfer).
- Effect of Assignment.
- Notice of Assignment.

VIII
OF TRANSFERS OF ACTIONABLE CLAIMS

130. Transfer of actionable claim.—(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instrument, and thereupon all rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance, or effects the provisions of Section 38 of the Insurance Act, 1938.

Illustrations

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in Section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of Section 130 and to the provisions of Section 132.

(482)

TRANSFER OF ACTIONABLE CLAIMS

Actionable claims are incorporeal movable properties. They are beneficial interests in the movables. According to Section 3 of the Transfer of Property Act, actionable claims include :

(i) unsecured money debt and, (ii) beneficial interest in movables not in possession of the claimant. Under English Law, movables were classified into two categories. Movables which were '*choses in possession*' are tangible movable properties e.g. Table, Television, Car etc. which are capable of being possessed. Movables which were '*choses in action*' are intangible movable properties, e.g., claim of money or, claim of movables, i.e., beneficial interest in the movables. Beneficial interest in movables or choses in action are known as actionable claims.¹ Actionable claims or the beneficial interest in movables cannot be possessed or seen physically but, they are known when action is maintained in the Court for their claim. It is obvious, therefore, that since they, have no physical existence, some special procedure must be adopted to effect their transfer.

Section 130 makes it clear that actionable claims are transferable properties. Any kind of transfer, e.g., sale, gift, exchange or mortgage of an actionable claim is possible.² Debts are assets of the assignor Bank. A Bank can always transfer its assets. Such transfer does not affect any rights or interests of the borrowers (bank's customers). Moreover there is no prohibition in the Banking Regulation Act, 1949, against transfer of assets by Banks *inter se*.³ The act of assignment does not have the effect of making Banks as traders in debts.³

This section prescribes mode of effecting the transfer of actionable claims.

Mode of Assignment (transfer).—According to Section 130, transfer of actionable claims, whether with or without consideration, must be made by an instrument in writing. The instrument must be signed by the transferor or by his duly authorised agent. There cannot be oral assignment of any actionable claim. It is also to be noted that registration is not necessary to effect the transfer. It is also not necessary that there is a separate deed for transfer. If there is an

1. For detailed account of actionable claims, see commentaries on Section 3 under the head "Actionable Claims".

2. *Sunrise Associates v. Comr. of NCT of Delhi*, AIR 2006 SC 1908, actionable claims are transferable both under Section 130 and debtors Section 130. The Court therefore clarified that it was erroneously assumed in *Vikas Sales* (1996) 4 SCC 433 that actionable claims are not distinguishable, and erroneously concluded on that basis that it was this feature which Act, 1930.

3. *ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd.*, AIR 2011 SC 1521.

endorsement transferring the right under a promissory note, the actionable claim is deemed to be transferred and the transferee is in position to recover money due under the promissory note without obtaining a decree on the debt itself.⁴ This section does not prescribe any specific words to be used for assignment of debts or actionable claims. There should be an intention to transfer the debt represented by the receipts and the intention must be evidenced in writing.⁵ Right to participate in a lottery-draw is 'beneficial interest' and an actionable claim. In *Anraji v. Govt. of Tamil Nadu*,⁶ the Supreme Court held that transfer of the right to participate in the draw held in a lottery is a transfer of actionable claim and may be effected by a written instrument.

Effect of Assignment.—Transfer of actionable claims takes effect after execution of the instrument. The execution is complete when the transferor puts his signature or thumb impression. After execution, all the rights and remedies of the transferor pass on to the transferee (assignee). The assignee himself becomes entitled to recover the claims and sue on his own name. Since the assignee becomes 'owner' of all the rights and liabilities in respect of the actionable claim transferred to him, he is subject to also the liabilities therein.

Notice of Assignment.—Notice of the assignment of actionable claim (say, debt) to debtor is not necessary for completing the transfer. But, until the debtor gets notice of the fact that the claim has been assigned to a third person, his dealings with original creditor shall be protected under the law. Thus, although notice is not a condition precedent to the validity of the assignment of a debt yet, in his own interest the assignee should give notice of transfer to debtor.

The concluding paragraph of Section 130 provides that *marine or, fire policies* are exempted from the provisions of this section. Nothing in this section affects also the provisions of Section 38 of the Insurance Act, 1938.

130-A. Transfer of policy of marine insurance.—[Repealed by the *Marine Insurance Act, 1963* (11 of 1963), Section 92].

131. Notice to be in writing, signed.—Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Notice is not necessary to perfect the title of the assignee of a debt. But, until the debtor receives notice of the assignment in accordance with law, his dealings with the original creditor will be protected.⁷ Accordingly, notice is necessary to protect the interest of the assignee. In the absence of notice, the

transferee shall lose his claim which is paid to the transferor. This has been explained by illustration (i) of this section. Section 131 provides following two requirements for a valid notice:

(a) The notice must be in *writing* and state the name and address of the transferee.

(b) It must also be *signed* by the transferor or his duly authorised agent or, where transferor refuses to sign, it must be signed by the transferee or his agent.

132. Liability of transferee of actionable claim.—The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations

(i) A transfers to C a debt to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

After execution of the instrument assigning actionable claim, all the rights and liabilities in respect of the claim pass on from transferor to the transferee. The liabilities and equities, to which the transferor was subject to at the date of transfer, become the liabilities and equities of the transferee. Transferor can get no better title than the transferor. The assignee is bound by the liabilities of the assignor in respect of the claim being transferred even if the assignee had no notice of such liabilities. For example, a debtor has a right to set off any counter claim against the assignee which he was entitled to enforce against the assignor. The provisions of this section have been applied to Court-sales.⁸

133. Warranty of solvency of debtor.—Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration to the amount or value of such consideration.

When a debt is transferred the transferee may run the risk of losing the claim in case the debtor is an insolvent. As a precautionary measure, the transferee should assure that debtor is solvent. However, the transferor is not bound to give any warranty regarding solvency of the debtor. But, at the

4. *State Bank of India, Madras v. Venkateswami Stores*, A.I.R. 1987 Mad. 221.

5. *Sinon Thomas v. State Bank of Travancore*, (1976) K.L.T. 554.

6. A.I.R. 1986 S.C. 63.

7. See *Mulla: TRANSFER OF PROPERTY ACT*, Ed. VII, p. 820.

8. *Ram Chandra v. Shankar*, A.I.R. 1944 Nag. 98.

instance of transferee the transferor may give warranty as to solvency of the debtor. Section 133 provides that when the transferor of a debt gives warranty as to solvency of the debtor, in the absence of any contract to contrary, the warranty applies to his solvency only at the date of transfer. Further, where the transfer is for consideration, any such warranty extends only to the amount or value of such consideration. However, this rule is applicable only where the transferor actually gives such warranty. It is open to the parties to contract any contrary stipulation.

134. Mortgaged debt.—Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by transferor or recovered by the transferee, is applicable, firstly, in payment of the costs of such recovery; Secondly, in or towards satisfaction of the amount for the time being secured by the transfer, and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Actionable claim is property and transfer of this property by way of mortgage is possible. Actionable claim is unsecured money debt. This debt may be secured by another debt (actionable claim). So, where a debt is transferred for securing another existing or, future debt it is nothing but transfer of an actionable claim by way of mortgage. Section 134 provides following rules under which the money realised out of such debt is to be appropriated: *Firstly*, the debt received by transferor or recovered by transferee is to be applied in payment of the cost of such recovery. *Secondly*, it is to be applied towards satisfaction of the amount secured by the transfer. *Thirdly*, if any residue remains after the above-mentioned payments, the remainder is to be given to the transferor.

135. Assignment of rights under policy of insurance against fire.—Every assignee by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

The general rules for assignment of actionable claims are inapplicable to the assignment of rights under the insurance policies of fire or marine. This is because of the fact that such rights cannot be assigned without transfer of the property insured. Mere transfer of such policy cannot entitle the assignee to get ownership of the property insured. The assignment of rights so insured, meaningless if the assignment is made apart from the property so insured. Accordingly, Section 135 enacts that every assignee, of a policy of insurance against fire, in whom the property insured shall be absolutely vested at the date of assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself. The assignment may have been made either by endorsement or other writing. It is significant to note that these provisions are applicable only to a policy of

insurance against fire. These provisions do not apply to assignment of rights under policy of marine insurance.

135-A. Assignment of rights under policy of marine insurance.—[Repealed by the *Marine Insurance Act, 1963* (11 of 1963), Section 92].

136. Incapacity of officers connected with Courts of Justice.—No judge, legal practitioner, or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

Who cannot be assignees of actionable claims?—Section 136 enacts that certain persons, specified therein, cannot be assignees of actionable claims. It may be noted that transfer of actionable claims is a transfer of property. As such, transferor and transferee both must be competent persons and the property must also be transferable within the meaning of Section 6 of this Act. Section 6(iii) provides that if property is transferred to a 'legally disqualified person', the property becomes non-transferable property. Section 136 specifies the person who are legally disqualified to be transferee for the transfer of actionable claims. According to this section no Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in or, stipulate for or agree to receive any share or interest in any actionable claim. It further provides that no Court of Justice shall enforce at his instance or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him. The object of such prohibition is to ensure the impartiality of judiciary. In *Kendroose v. Serle*,⁹ the Privy Council stated thus:

"It is of great importance that no officer of a Court of Justice should be even exposed to the suspicion that in the discharge of his official duties his conduct may be influenced by any personal consideration."

However, it may be noted that although the above-mentioned persons cannot buy or deal with another person's actionable claim privately, but they can sell their own actionable claims.

137. Saving of negotiable instruments, etc.—Nothing in the foregoing sections of this Chapter applies to stocks, share or or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's

⁹ (1846) 3 M.L.A. 329 at p. 346.

cited in Mulla's TRANSFER OF PROPERTY ACT, Ed. VIII (reprint 1990), p. 827.

certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods hereby represented.

Under Section 137 documents which are in the nature of negotiable instruments are exempt from the operation of the provisions of this Chapter. Negotiable instruments are regulated by the Negotiable Instruments Act. Normally, the negotiable instruments are assigned by endorsement and delivery of possession or, if payable to bearer, by delivery alone. So, the assignment of stocks, shares or debentures or instruments which are for the time being, by law or custom, negotiable, or any mercantile document of title to goods, has been exempted from the operation of this Chapter. Mercantile document of title to goods have been enumerated in the Explanation to this section. Their transfer is governed by the law or custom of the merchants. A Railway Receipt is a document of title to goods. In *Commissioner of Income Tax v. Bipul Textiles Ltd.*,¹⁰ the Supreme Court held that when it is handed over to the consignee on payment, the property in the goods is transferred.

A negotiable instrument may be transferred also like any actionable claim under this Act. Section 137, while giving an additional privilege to mercantile documents, does not restrict the transfer of negotiable instruments otherwise than by way of an endorsement.

APPENDIX I

THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

[ACT NO. 45 OF 1988]*

[5th September, 1988]

An Act to prohibit benami transactions and the right to recover property held benami and for the matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty-ninth Year of the Republic of India as follows :—

1. Short title, extent and commencement.—(1) This Act may be called the Benami Transactions (Prohibition) Act, 1988.

It extends to the whole of India except the State of Jammu and Kashmir.

The provisions of Ss. 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

(b) "prescribed" means prescribed by rules made under this Act;

(c) "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

3. Prohibition of benami transactions.—(1) No person shall enter into any benami transaction.

*(2) Nothing in sub-section (1) shall apply to—

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a—

(i) depository as a registered owner under sub-section (1) of Section 10 of the Depositories Act, 1996;

(ii) participant as an agent of a depository.

* Received the assent of the President on 5-12-1988, and published in *Gaz. of India*, 6-12-88, Part II, S. 1, Ext., p. 1 (No. 59).

** Substituted vide Schedule (Part V) of the Depositories Act, 1996. The substituted sub-section (2) before its substitution ran as under :—“(2) Nothing in sub-sec. (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.”

Explanation.—The expressions 'depository' and 'participant' shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of Section 2 of the Depositories Act, 1996.]

(3) Whoever enters into any *benami* transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 an offence under this section shall be non-cognizable and bailable.

4. Prohibition of the right to recover property held *benami*.—(1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held *benami*, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,—

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

5. Property held *benami* liable to acquisition.—(1) All properties held *benami* shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed.

(2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-sec. (1).

6. Act not to apply in certain cases.—Nothing in this Act shall affect the provisions of Section 53 of the Transfer of Property Act, 1882, or any law relating to transfers for an illegal purpose.

7. Repeal of provisions of certain Acts.—(1) Sections 81, 82 and 94 of the Indian Trust Act, 1882, Section 66 of the Code of Civil Procedure, 1908 and Section 281-A of the Income-tax Act, 1961, are hereby repealed.

(2) For the removal of doubts, it is hereby declared that nothing in sub-sec. (1) shall affect the continued operation of Section 281-A of the Income-tax Act, 1961 in the State of Jammu and Kashmir.

8. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the authority competent to acquire properties under Section 5;

(b) the manner in which, and the procedure to be followed for the acquisition of properties under Section 5;

(c) any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

9. Repeal and saving.—(1) The *Benami Transactions (Prohibition) Act, 1988* is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

APPENDIX II

AMENDMENT TO THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988*

(45 OF 1988)

In Section 3, for sub-section (2), the following sub-section shall be substituted, namely:

"(2) Nothing in sub-section (1) shall apply to—

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a—

(i) depository as a registered owner under sub-section (1) of Section 10 of the Depositories Act, 1996;

(ii) participant as an agent of a depository.

Explanation.—The expressions 'depository' and 'participant' shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of Section 2 of the Depositories Act, 1996."

APPENDIX III

THE TRANSFER OF PROPERTY (AMENDMENT) ACT, 2002

[Act No. 3 of 2003 dated 31-12-2002]

An Act

further to amend the Transfer of Property Act, 1882

Be it enacted by Parliament in the fifty-third Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Transfer of Property (Amendment) Act, 2002.

2. Substitution of new section for Section 106.—For Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as the principal Act), the following section shall be substituted, namely:—

"106. Duration of certain leases in absence of written contract or local usage.—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceedings is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or, if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

3. Transitory provisions.—The provisions of Section 106 of the principal Act, as amended by Section 2, shall apply to—

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act; and

(b) all notices which have been issued before the commencement of this Act but where no suit or proceeding has been filed before such commencement.

* Vide Schedule (Part V) of the Depositories Act, 1996. Received the assent of the President on 10-8-1996 and published in Gaz. of India, 12-8-1996 Part II S. 1 Ext. p. 1.

APPENDIX IV

RESUME OF THE REGISTRATION AND OTHER RELATED LAWS (AMENDMENT) ACT OF 2001 (ACT 48 OF 2001)¹

Further to amend the Registration Act, 1908, the Transfer of Property Act, 1882 and the Indian Stamp Act, 1899.

Be it enacted by Parliament as follows :—

CHAPTER I

PRELIMINARY

1. Short title.—This Act may be called the Registration and other Related Laws (Amendment) Act, 2001.

CHAPTER II

AMENDMENT OF THE REGISTRATION ACT, 1908

2. Insertion of new Section 16A.—In the Registration Act, 1908 (16 of 1908) (hereafter in this Chapter referred to as the Registration Act), after Section 16, the following section shall be inserted, namely :—

"16A. *Keeping of books in computer floppies and diskettes, etc.*—(1) Notwithstanding anything contained in Section 16, the books provided under sub-section (1) of that section may also be kept in computer floppies or diskettes or in any other electronic form in the manner and subject to the safeguards as may be prescribed by the Inspector-General with the sanction of the State Government.

(2) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy or extracts from the books kept under sub-section (1) given by the registering officer under his hand and seal shall be deemed to be a copy given under Section 57 for the purposes of sub-section (5) of that section."

3. Amendment of Section 17.—In Section 17 of the Registration Act,—

(a) after sub-section (1), the following sub-section shall be inserted, namely :—

"(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such

commencement, then, they shall have no effect for the purposes of the said Section 53A."

(B) in sub-section (2), in clause (v), for the opening words "any document", the words, brackets, figure and letter "any document other than the documents specified in sub-section (1A)" shall be substituted.

4. Amendment of Section 30.—In Section 30 of the Registration Act, sub-section (2) shall be omitted.

5. Insertion of new Section 32.—After Section 32 of the Registration Act, the following section shall be inserted, namely :—

"32A. Compulsory affixing of photograph, etc. Every person presenting any document at the proper registration office under Section 32 shall affix his passport size photograph and fingerprints to the document."

6. Amendment of Section 49.—In Section 49 of the Registration Act, in the proviso, the words, figures and letter "or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 (4 of 1882)," shall be omitted.

7. Amendment of Section 52.—In Section 52 of the Registration Act, in sub-section (1), in clause (a), after the words "and place of presentation", the words, figures and letter "the photograph and finger-prints affixed under Section 32A" shall be inserted.

8. Omission of Section 67.—Section 67 of the Registration Act shall be omitted.

9. Amendment of Section 69.—In Section 69 of the Registration Act, in sub-section (1), after clause (a), the following clause shall be inserted, namely :—

"(aa) providing the manner in which and the safeguards subject to which the books may be kept in computer floppies or diskettes or in any other electronic form under sub-section (1) of Section 16A."

CHAPTER III

AMENDMENT OF THE TRANSFER OF PROPERTY ACT, 1882

10. Amendment of Section 53A of Act 4 of 1882.—In Section 53A of the Transfer of Property Act, 1882 (4 of 1882), the words "the contract, though required to be registered, has not been registered, or," shall be omitted.

CHAPTER IV

AMENDMENT OF THE INDIAN STAMP ACT, 1899

11. Amendment of Schedule I of Act 2 of 1899.—In Schedule I to the Indian Stamp Act, 1899—

(a) under column heading "Description of Instrument", in article No. 23, in *Entrypart*, the portion beginning with the words "Assignment of Copyright"

¹ Received assent of the President on 24.4.2001.

and ending with the word and figure "Section 5" shall be numbered as clause (a) thereof, and after clause (a) as so numbered, the following clause shall be inserted, namely :—

"(b) for the purpose of this article, the portion of duty paid in respect of a document falling under article No. 23A shall be excluded while computing the duty payable in respect of a corresponding document relating to the completion of the transaction under this article."

(b) after article No. 23 and the entries relating thereto, the following article No. and the entries shall be inserted, namely :—

12. *Saving*—Notwithstanding anything contained in Sections 6 and 10, any—

(a) right of a transfer or any person claiming under him debarred under Section 53A of the Transfer of Property Act, 1882 (4 of 1882) immediately before the commencement of this Act shall remain so debarred as if Section 10 had not come into force in respect of such right; and

(b) unregistered document relating to the right referred to in clause (a) may be received as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) as if Section 6 had not come into force in respect of such document.

Statement of Objects and Reasons

The Registration Act, 1908 was enacted to consolidate the law relating to the registration of documents. The Conference of Chief Ministers and Finance Ministers of States and Union Territories convened by the Union Finance Minister held on the 14th September, 1998 at New Delhi, *inter alia*, arrived at the following conclusions, namely :—

- (i) sub-section (2) of Section 30 of the Registration Act, 1908 should be repealed;
- (ii) registration of general power of attorney which is in the nature of a contract to sell immovable property be made compulsory and consequential amendments be made in the Registration Act, 1908, the Transfer of Property Act, 1882 and the Indian Stamp Act, 1899;
- (iii) to make affixing of the photograph and finger prints of the executants compulsory at the time of registration of documents;
- (iv) to make an enabling provision for computerisation of registration records.